It’s Not Just “Litigation Lite” - Making Rulings on Evidentiary Objections

March 17, 2015 – 1:00 p.m. to 2:00 p.m. ET

PROGRAM SUMMARY

Speaker: Mark Kantor, Esq.

Arbitration, whether domestic or international, is not just “litigation lite.” When it comes to evidence, arbitrators follow the applicable arbitration rules and arbitration law, not the Federal Rules of Evidence or Federal Rules of Civil Procedure. And while an arbitrator has broad discretion to admit or reject evidence, that authority is not unlimited. Consequently, the scope of admissible evidence, the nature of evidentiary objections, the relationship between admissible evidence and document production and other pre-hearing discovery, even the value of that evidence itself, can present challenges for someone unfamiliar with the arbitral environment. The differences are even more substantial in international arbitrations. This 60-minute webinar will be your roadmap for navigating the evidentiary landscape.

AGENDA

1:00 p.m. Welcome and Introduction of Speaker (5 minutes)

1:05 p.m. Evidentiary Objections (50 minutes)
• Why do arbitrators commonly admit challenged evidence?
• Comparison between grounds for vacatur with grounds for appeal of a trial court decision to a court of appeal.
• Using evidentiary objections as platforms for advocacy rather than as grounds for overturning an award by a court.
• Admittance of Evidence - Arbitration v. Court
• “Best Practices” for evidentiary practice
• IBA Rules for the Taking of Evidence in International Arbitration.
• The “know your arbitrator” rule; differences between US domestic and international arbitrations.

1:55 p.m. Conclusion and Questions (5 minutes)

2:00 p.m. Evaluation (5 minutes)

2:05 p.m. Adjourn
MARK KANTOR

Until he retired from Milbank, Tweed, Hadley & McCloy, Mark Kantor was a partner in the Corporate and Project Finance Groups of the Firm. He currently serves as an arbitrator and mediator. He teaches as an Adjunct Professor at the Georgetown University Law Center (Recipient, Fahy Award for Outstanding Adjunct Professor). Additionally, Mr. Kantor is Editor-in-Chief of the online journal Transnational Dispute Management.

Mr. Kantor is a member of the Board of Directors of the American Arbitration Association, Chair of the DC Bar International Investment Committee and former Chair and Vice Chair of the DC Bar International Dispute Resolution Committee, and a Chartered Arbitrator of The Chartered Institute of Arbitrators. He is honored in Who’s Who in America; Who’s Who in the World; Who’s Who in American Law; International Who’s Who, Commercial Arbitration; Chambers USA, International Arbitrators; Best Lawyers in America (International Arbitration; Washington, D.C.); Superlawyers; U.S. News & World Report, Tier 1 International Arbitration; Best Lawyers 2013 Washington DC International Arbitration - Governmental "Lawyer of the Year." Recipient, ArbitralWomen Honorable Man Award (2011).

Mr. Kantor is also a member of the Editorial Board of Global Arbitration Review, the Board of Editors of the Journal of World Energy Law and Business, the Board of Editors of the Journal of Damages in International Arbitration, the Editorial Board of the Journal of Technology in International Arbitration and the ADR Advisory Board of the International Law Institute. Among other publications, Mr. Kantor is the author of Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence (Kluwer 2008), named Best Book of 2008 in the OGEIMD Awards, and “A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?” 26 Arbitration International 323 (2010), named Best International Dispute Resolution Article of 2010 in the OGEIMD Awards. Additional information at www.mark-kantor.com.
It’s Not Just “Litigation Lite”
Making Rulings on Evidentiary Objections

Case citations regarding document subpoenas to third parties in arbitration referenced by Mr. Kantor are as follows:

Yes - American Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Communications of Detroit, Inc.), 164 F.3d 1004 (6th Cir. 1999).

Yes - In re Security Life Insurance Co. of America, 228 F.3d 865 (8th Cir. 2000).


No, with possible hardship exception - COMSAT Corp. v. National Science Foundation, 190 F.3d 269, 275 (4th Cir. 1999).
Lists, Checklists, Guidelines, Principles, Techniques, Protocols, Best Practices: Are They Useful?

By Karen Mills

Previous Post
Uncertainty Continues to Loom Over BG Group v. Argentina After Supreme Court Oral Argument

Next Post
Arbitrating Disasters

16 Jan 2014

Lists, Checklists, Guidelines, Principles, Techniques, Protocols, Best Practices: Are They Useful?

By Karen Mills, Mirèze Philippe and Ileana M. Smeureanu

The views expressed are those of the authors alone and should not be regarded as representative of or binding upon the institution or the law firms they belong to.

In the last twenty years there has been a proliferation of books, publications and articles about arbitration. Since the last decade arbitration news exchanges on listserves and through newsletters have further added to this industry of arbitration documentation. The arbitration community has noticed this phenomenon and sees in this abundance of material the desire of practitioners to share their knowledge and experience. Newcomers in the field can also see that the best way to get on stage is to publish. The success of arbitration has also encouraged students who choose this field as their future practice area to participate in this publication fever as they learn how to become visible. In addition, many organizations and law firms have their own electronic newsletters.

The wealth of information available offers helpful and concise guidance and tools to assist practitioners in their daily practice. In an age where practitioners are short of time and are faced with a plethora of documentation to read, putting in place helpful guidance and tools may be of valuable assistance in ensuring that the basic issues for each stage of an arbitration are remembered. Lists, checklists, guidelines, principles, techniques, protocols, and best practices elaborated by organizations and working groups like UNCITRAL, IBA, ABA, ICC, or by law firms, facilitate the work of the parties in preparing and arguing their case, and help the arbitrators organize and conduct the proceedings.

Some practitioners tend to think that there are far too many tools and that experience and common sense should always prevail; others appreciate that these tools help establish a common playing field where practitioners from different generations, backgrounds and cultures attempt to speak one “language”. Moreover, it should be noted that some tools have only limited use because they are familiar in certain jurisdictions but unknown in others, for example Skeleton Arguments, used in some arbitrations in which English procedure applies.

Although this trove of guidance and tools have no binding effect, they can be extremely helpful in assisting not only less experienced practitioners but can serve as guides even to the most experienced users. The best practices offered may assist in avoiding pitfalls at all stages: before a dispute arises – by drafting an effective arbitration clause; after it has arisen – by correctly preparing a request for arbitration; and when the arbitration process has already commenced – by conducting a procedure in the most appropriate way and by rendering an enforceable award.

Law firms have also their own best practices to promote efficiency in international arbitration and some of them choose to share them publicly. Published lists may prove to be helpful to users who have no lists or who wish to
benefit from the experience of their peers.

The purpose of this discussion is to draw attention to the usefulness of such lists, checklists, guidelines, principles, techniques, protocols, and best practices. The authors have selected only a few (there exists dozens) which are among the most widely known in international arbitration or which, in the authors’ opinion, deserve to be better known.

- **IBA Guidelines for Drafting International Arbitration Clauses** (2010): Arbitration clauses are the door to arbitration and determine the main procedural aspects of a case. Several checklists are available on the internet. The most widely-known, in addition to the IBA Guidelines, are probably Paul Friedland’s ‘Arbitration Clauses for International Contracts’, Doak Bishop’s ‘Practical Guide to Drafting International Arbitration Clauses’ (both were members of the Task Force which drafted the IBA Guidelines), and Arif Hyder Ali’s ‘Best Practices in Drafting Arbitration Clauses’. These instruments are indispensable, because experience demonstrates that more than half of arbitration clauses are either badly drafted or ambiguous. In the worst case scenario, a badly drafted (often called *pathological*) clause can even preclude arbitration. However experienced a drafter may be, it seems useful to refer to a list, at least to make sure that no basic principle has been forgotten and that complex situations have been correctly addressed as far as possible.

- **IBA Rules on the Taking of Evidence in International Arbitration** (1999 amended in 2010): These are probably the guidelines most widely used, together with the IBA Guidelines on Conflicts of Interest. Parties and arbitrators often adopt them as a part of the arbitral procedure, as can be seen in procedural orders, terms of reference and awards.

- **IBA Guidelines on Conflicts of Interest in International Arbitration** (2004): In a ten-year period this has become the industry standard reference, adopted by practitioners worldwide, including some arbitral institutions, in relation to disclosure of any matter which may give rise to doubts as to the arbitrators’ impartiality or independence, and in relation to challenge of arbitrators. The reference to such Guidelines is reflected in case law related to objections to appointment of arbitrators or to their challenge.

- **UNCITRAL Notes on Organizing Arbitral Proceedings** (1996): The purpose of this is to assist arbitration practitioners by listing and briefly describing matters for possible consideration when organizing proceedings. They are meant for universal use rather than being designed as best practices. They address issues as diverse as the place of arbitration, the language of the procedure, confidentiality, evidence, witnesses and so on. They may be very useful especially for practitioners who have little experience in arbitration. The UNCITRAL Secretariat has carried out a survey on their use and indicated that practitioners find them useful. It was decided at UNCITRAL session of July 2013 that the Notes will be updated and that the work will be entrusted to a working group to ensure that the universal acceptability of those Notes would be preserved.

- **Redfern Schedule**: This schedule is used to track document production. It contains columns aimed at summarizing the documents requested, the requesting party’s justifications, the requested party’s objections and the arbitrators’ ruling on each request. It appears to be used in many cases and can help reduce the time and cost involved in document production, where applicable.

- **Sachs Protocol** (2010): At the Rio de Janeiro ICCA Congress, Klaus Sachs presented a protocol intended to be an alternative approach to expert evidence. In order to remedy potential disadvantages of party-appointed experts and address the concern of tribunal-appointed experts, he suggested a concept of “expert teaming” aimed at combining the advantages of both. The suggestion is that the parties provide a short list of potential experts and that the tribunal chooses one from each side’s list, resulting in an expert team. As described by Martin Hunter in his blogpost ‘Experts in International Arbitration’, it is an “ingenious ‘hybrid’ system”. It is likely to address the concerns of users and the cost-related process of appointing experts by tribunals in addition to experts appointed by parties. Such Protocol seems to offer a practical solution although it is not as yet universally known and thus it is too early to determine how often it is used.
ICC Techniques for Controlling Time and Costs in Arbitration (2007, revised 2012): This document contains very practical recommendations aimed at reducing time and costs, which are one of the primary concerns expressed in the arbitration community in the last ten years. They have turned out to be so useful that some of the techniques have been incorporated into one of the Appendices to the revised ICC Arbitration Rules (2012) devoted to case management.

Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration (2011): This report of the ICC Commission on Arbitration Task Force responds to the need for guidance in this field where production of electronic documents has become an increasing concern. (See also Jonathan Frank & Julie Bédard ‘Electronic Discovery in International Arbitration’).

Using Technology to resolve Business Disputes (2004): The Task Force on IT in Arbitration of the ICC Commission on Arbitration has established unique and efficient lists on ‘Issues to be Considered When Using IT in International Arbitration’ and ‘Operating Standards for Using IT in International Arbitration’ (ICC Special Supplement 2004), aimed at assisting parties and arbitrators in addressing IT-related issues as diverse as organizing paperless files and videoconferencing (www.iccdrl.com, Commission Reports, 2004).

From the contributors’ viewpoint, the lists, checklists, guidelines, principles, techniques, protocols, best practices and so on are essential. They offer a summary of issues to verify in order to make sure that all appropriate actions have been taken and hopefully none forgotten, and enable practitioners to keep up with the ever evolving practices and procedures in the field and to participate in and conduct the most efficient arbitration procedures. These tools are meant to facilitate the work of practitioners and spare them the effort of “reinventing the wheel”, with the ultimate goal of saving time and costs. Using these instruments does not mean that practitioners lack knowledge or experience, but shows that recommendations by peers may be useful even if practitioners have their own way of doing things. Overall, they contribute to making arbitration universal.

Previous Post
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Next Post
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Federal Arbitration Act

9 U.S. Code § 10 - Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 U.S. Code § 207 - Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.
Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

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Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

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Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.
Domestic Arbitration
Best Practice Materials

Guides for Drafting Arbitration Clauses

- **AAA Drafting Dispute Resolution Clauses - A Practical Guide**
  http://www.adr.org/si.asp?id=6344

- **AAA Review of Consumer Clauses**
  http://www.adr.org/si.asp?id=5649

- **Chartered Institute of Arbitrators (CIArb) Model Contract Clauses and Agreements**
  http://www.ciarb.org/dispute-resolution/dispute-resolution-contract-clauses/

- **JAMS Clause Workbook: A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts**
  http://www.jamsadr.com/ clauses/#Resolution

- **CPR Model Clauses and Sample Language**: This document offers a detailed multi-step clause and a variety of drafting options for agreements.

- **CPR Model Master Dispute Resolution Agreements - Litigation**: This document is a Model Master Dispute Resolution Agreement for Litigation (Negotiation-Mediation-Litigation). This form as drafted covers all disputes between the parties.

- **CPR Model Master Dispute Resolution Agreements - Arbitration**: This is a Model Master Agreement for Arbitration (Negotiation-Mediation-Arbitration).
Arbitrator Selection Process

- CIArb Guideline on the Interviewing of Prospective Arbitrators
- CPR's Due Diligence Evaluation Tool for Selecting Arbitrators and Mediators:

Ethical Guidelines for Arbitrators

- ABA Code of Ethics for Arbitrators in Commercial Disputes
  [http://meetings.abanet.org/webupload/commupload/DR011000/newsletterpubs/commercial_disputes.pdf](http://meetings.abanet.org/webupload/commupload/DR011000/newsletterpubs/commercial_disputes.pdf)
- ABA/College of Commercial Arbitrators Annotations to the Code of Ethics for Arbitrators in Commercial Disputes
- Comparing the Original with the Revised ABA – AAA Code of Ethics for Arbitrators in Commercial Disputes
  [http://meetings.abanet.org/webupload/commupload/DR011000/newsletterpubs/aaacodeofethics.pdf](http://meetings.abanet.org/webupload/commupload/DR011000/newsletterpubs/aaacodeofethics.pdf)
- CPR-Georgetown Commission on Ethics and Standards in ADR’s Model Rule for The Lawyer as Third-Party Neutral:
• CPR-Georgetown Commission on Ethics and Standards in ADR’s Principles for ADR Provider Organizations:

• JAMS Arbitrators Ethics Guidelines http://www.jamsadr.com/arbitrators-ethics/

Discovery

• JAMS Recommended Arbitration Discovery Protocols For Domestic, Commercial Cases http://www.jamsadr.com/arbitration-discovery-protocols/

• CPR’s Protocol on Document Disclosure & Presentation of Witnesses in Commercial Arbitration: Recognizing that there may be different interests and expectations on the part of arbitration users and their counsel, the Protocol offers various “modes” of disclosure and presentation of witnesses, ranging from minimal to extensive, so that the parties to an agreement to arbitrate may choose, at the time of entering into their agreement or thereafter, the general way in which their arbitration proceedings will be conducted in the important areas of document disclosure and witness presentation.

• New York State Bar Association Report by Arbitration Committee of Dispute Resolution Section: Arbitration Discovery in Domestic Commercial Cases
E-Discovery

- **CPR’s Protocol on Document Disclosure & Presentation of Witnesses in Commercial Arbitration**: Recognizing that there may be different interests and expectations on the part of arbitration users and their counsel, the Protocol offers various “modes” of disclosure and presentation of witnesses, ranging from minimal to extensive, so that the parties to an agreement to arbitrate may choose, at the time of entering into their agreement or thereafter, the general way in which their arbitration proceedings will be conducted in the important areas of document disclosure and witness presentation.
  

- **CIArb Protocol for e-disclosure in arbitration**
  
  [Link](http://www.ciarb.org/information-and-resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols/)

Practice Guidelines

- **AAA Guidelines for Written Arbitration**: Suggested method for resolving disputes by submission of documents. [Link](http://www.adr.org/si.asp?id=5028)

- **The College Of Commercial Arbitrators (CCA) Protocols for Expeditious, Cost-Effective Commercial Arbitration: Key Action Steps for Business Users, Counsel, Arbitrators & Arbitration Provider Institutions**. This document begins with an analysis of problems faced in arbitration, and the need for a mutual effort on behalf of business users, in-house counsel, arbitration providers, outside counsel, and arbitrators to resolve these issues. This study is


- CIArb Guideline on interim measures of protection

- A Guide to Self-Administered ADR and CPR’s Dispute Resolution Services:
  This guide explains the differences between self-administered and administered ADR, as well as how ADR proceedings can be customized to make them more time and cost effective.

- CPR Arbitration Appeal Procedure: Most users of arbitration find the finality of an arbitration award appealing. But some parties to major cases are concerned about the possibility of an aberrant award and would like to be able to appeal from such an award to a tribunal of outstanding appellate arbitrators. In response to that concern, CPR has adopted the CPR Arbitration Appeal Procedure. The Procedure may be invoked whether or not the original arbitration was conducted under CPR Rules.

- CPR Protocol on Determination of Damages in Arbitration: The Protocol on Determination of Damages in Arbitration provides guidance to arbitrators, counsel and their clients for the efficient and fair development and presentation of
damages evidence in arbitration proceedings.


- **CPR's Due Diligence Evaluation Tool for Selecting Arbitrators and Mediators:**

- **New York State Bar Association Guidelines for the Arbitrator’s Conduct of the Pre-hearing Phase of International arbitrations**
  http://www.nysba.org/Content/NavigationMenu42/November62010HouseofDelegatesMeetingAgendaItems/internationalguidelines.pdf

**Awards – Drafting**

- **CIArb Guideline for arbitrators on proceeding and making awards in default of party participation**
  http://www.ciarb.org/information-and-resources/Practice%20Guideline%204%20English.pdf

- **CIArb Guideline for awards of interest**

- **CIArb Guideline on the formalities for drafting an arbitral award**

**Arbitrator Guidelines - Procedure**

- **CIArb Guideline for arbitrators on how to deal with challenges to their jurisdiction**
• CIArb Guideline for arbitrators on the use of ADR procedures
  http://www.ciarb.org/information-and-resources/practice-guidelines-and-
  protocols/list-of-guidelines-and-protocols/

• CIArb Guideline for arbitrators who receive notice of arbitration
  applications to the courts http://www.ciarb.org/information-and-
  resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols/

• CIArb Guideline for arbitrators on making orders relating to the costs of the
  arbitration http://www.ciarb.org/information-and-resources/practice-guidelines-
  and-protocols/list-of-guidelines-and-protocols/

• CIArb Guideline on security for costs http://www.ciarb.org/information-and-
  resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols/

• The Proceeds of Crime Act 2002: Guidance for arbitrators and mediators
  (CIArb) http://www.ciarb.org/information-and-resources/practice-guidelines-
  and-protocols/list-of-guidelines-and-protocols/

• CIArb Guideline on peremptory and unless orders
  http://www.ciarb.org/information-and-resources/practice-guidelines-and-
  protocols/list-of-guidelines-and-protocols/

• CIArb Guideline on multi-party arbitrations
  http://www.ciarb.org/information-and-resources/practice-guidelines-and-
  protocols/list-of-guidelines-and-protocols/

Arbitrator Guidelines – Remuneration

• CIArb Guidelines for arbitrators as to how to formulate their terms of
  remuneration http://www.ciarb.org/information-and-resources/practice-
  guidelines-and-protocols/list-of-guidelines-and-protocols/
Protocols for the Arbitration of Construction Disputes

- **AAA Construction Industry Guide to Dispute Avoidance and Resolution:** This guide offers suggestions for evaluating and selecting from a variety of procedural options to help parties in the construction industry design effective conflict-avoidance programs. The guide also presents options for early dispute resolution, including job-site options, for when disputes do arise.
  
  http://www.aaauonline.org/upload/THE%20CONSTRUCTION%20INDUSTRY'S%20GUIDE%20TO%20DISPUTE%20AVOIDANCE%20AND%20RESOLUTION.pdf

- **AAA Guide to Drafting Alternative Dispute Resolution Clauses for Construction Contracts**
  
  http://www.aaauonline.org/upload/THE%20GUIDE%20TO%20DRAFTING%20ALTERNATIVE%20DISPUTE%20RESOLUTION%20CLAUSES%20FOR%20CONSTRUCTION%20CONTRACTS.pdf

Protocols for the Arbitration of Consumer Disputes

- **AAA Consumer Due Process Protocol:** Statement of Principles of the National Consumer Disputes Advisory Committee
  
  http://www.adr.org/sp.asp?id=22019

- **AAA Review of Consumer Clauses:** This document provides disclosure information about consumer dispute resolution claims filed with the American Arbitration Association.
  
  http://www.aaauonline.org/upload/aaa_review_cons_clauses.pdf

- **AAA Consumer Guide - Representing Yourself in Arbitration:** This guide provides an overview of the arbitration process in general and addresses specific questions affecting parties who do not plan to utilize a representative in the
arbitration proceedings. Topics covered include the roles and responsibilities of the other parties and their representatives--as well as those of the arbitrator--and the steps of the ADR process, from the filing of the case to the hearing and the award.


- Chartered Institute of Arbitrators (CIArb) Guidelines for arbitrators dealing with cases involving consumers and parties with significant differences of resources http://www.ciarb.org/information-and-resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols/


Protocols for the Arbitration of Employment Disputes

- AAA Guide - Representing Yourself in Employment Arbitration: This guide provides an overview of the arbitration process in general and addresses questions affecting parties who do not plan to utilize a representative in the arbitration proceedings. Topics covered include the roles and responsibilities of the other parties and their representatives--as well as those of the arbitrator--and the steps of the ADR process, from the filing of the case to the hearing and the award. http://www.aaauonline.org/upload/representing_yourself_emp_arb_employee's_guide.pdf

- AAA Guide - Resolving Employment Disputes: This guide provides employers and their employees with information about the development and use of alternative dispute resolution (ADR) options available to resolve workplace
disputes, including designing an ADR program, checklist for employment arbitration programs, and model ADR clauses.  
http://www.aaauonline.org/upload/resolving_emp_disputes.pdf

- **AAA Employment Due Process Protocol**: This protocol provides guidance on due process in the resolution by mediation and binding arbitration of employment disputes involving statutory rights.  
http://www.adr.org/sp.asp?id=28535

Protocols for the Arbitration of Intellectual Property Disputes

- **Intellectual Property White Paper**: This paper addresses common myths about arbitration for the resolution of intellectual property disputes. 

Protocols for the Arbitration of Labor Disputes

- **AAA/FMCS/NAA Code of Professional Responsibility for Arbitrators of Labor-Management Disputes**  
http://www.adr.org/si.asp?id=5254

Protocol for the Arbitration of Sport-related Disputes

- **AAA Guide to Using ADR to Resolve Collegiate, Professional and Sports-Business Disputes**  
http://www.adr.org/sp.asp?id=39578
The College of Commercial Arbitrators

Protocols
for
Expeditious, Cost-Effective Commercial Arbitration

Key Action Steps for
Business Users, Counsel, Arbitrators
& Arbitration Provider Institutions

Thomas J. Stipanowich, Editor-in-Chief
Curtis E. von Kann and Deborah Rothman, Associate Editors

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The College of Commercial Arbitrators
Protocols for Expeditious, Cost-Effective
Commercial Arbitration

Key Action Steps for Business Users, Counsel, Arbitrators and
Arbitration Provider Institutions

Table of Contents

Foreword.................................................................................................................................vi
About the Editors ..................................................................................................................viii

I. Speed, Economy and Efficiency in Commercial Arbitration: Failed Expectations,
   Shared Responsibility ........................................................................................................ 1

II. The Root of the Problem: Arbitration Has Become Too Much Like Litigation ............4
   A. Reduced Use of Trial; Growth of Commercial Arbitration ........................................4
   B. Importation of Trial Practices into Arbitration ......................................................... 5
      1. Discovery .......................................................................................................................6
      2. Motion Practice ........................................................................................................... 8
      3. Other Concerns .......................................................................................................... 9
   C. Looking Beyond Litigation-Style Arbitration ............................................................. 10

III. Business Users & In-house Counsel, Providers, Outside Counsel and Arbitrators
    Must All Play a Role in Promoting Speed, Efficiency and Economy in Arbitration........13
    A. The Need for a Mutual Effort ..................................................................................... 13
    B. The Role of Business Clients and In-House Counsel ................................................14
       1. The Importance of Effective Choice-Making .......................................................... 15
       2. Reasons Business Clients and Counsel Fail to Take Control and Make
          Effective Choices ...................................................................................................... 15
       3. Business Clients and Counsel Must Change These Realities ............................... 16
    C. The Role of Provider Organizations ....................................................................... 17
    D. The Role of Outside Counsel .................................................................................. 19
    E. The Role of Arbitrators ........................................................................................... 20
    F. The Central Lesson .................................................................................................. 21
IV. Protocols for Expeditious, Cost-Effective Commercial Arbitration ........................................22

General Principles ........................................................................................................................................... 22

A Protocol for Business Users and In-House Counsel ............................................................................. 24

1. Use arbitration in a way that best serves economy, efficiency and other business priorities. Be deliberate about choosing between "one-size-fits-all" arbitration procedures with lots of "wiggle room" and more streamlined or bounded procedures ........................................................................................................................... 24

2. Limit discovery to what is essential; do not simply replicate court discovery. ................ 26

3. Set specific time limits on arbitration and make sure they are enforced. ......................... 26

4. Use "fast-track arbitration" in appropriate cases ........................................................................ 29

5. Stay actively involved throughout the dispute resolution process to pursue speed and cost-control as well as other client objectives ........................................................ 29

6. Select outside counsel for arbitration expertise and commitment to business goals ................................................................................................................................................................................................... 30

7. Select arbitrators with strong case management skills ...................................................... 32

8. Establish guidelines for early "fleshing out" of issues, claims, defenses, and parameters for arbitration ........................................................................................................................ 34

9. Control motion practice .................................................................................................................. 36

10. Use a single arbitrator in appropriate circumstances ........................................................... 37

11. Specify the form of the award. Do not provide for judicial review for errors of law or fact ........................................................................................................................................... 38

12. Conduct a post-process "lessons learned" review and make appropriate adjustments ........................................................................................................................................... 42

A Protocol for Arbitration Providers ....................................................................................................... 43

1. Offer business users clear options to fit their priorities ........................................................................ 43

2. Promote arbitration in the context of a range of process choices, including "stepped" dispute resolution processes ........................................................................................................................................... 44

3. Develop and publish rules that provide effective ways of limiting discovery to essential information ........................................................................................................................................... 45

4. Offer rules that set presumptive deadlines for each phase of the arbitration; train arbitrators in the importance of enforcing stipulated deadlines ........................................................................................................................................... 55

5. Publish and promote "fast-track" arbitration rules ........................................................................ 55

6. Develop procedures that promote restrained, effective motion practice ...................................... 56

7. Require arbitrators to have training in process management skills and commitment to cost- and time-saving ........................................................................................................................................... 56
8. Offer users a rule option that requires fact pleadings and early disclosure of documents and witnesses. ............................................................... 57

9. Provide for electronic service of submissions and orders........................................ 57

10. Obtain and make available information on arbitrator effectiveness. ................ 58

11. Provide for expedited appointment of arbitrators.................................................. 58

12. Require arbitrators to confirm availability. .......................................................... 59

13. Afford business users an effective mechanism for raising and addressing concerns about arbitrator case management. ............................................. 60

14. Offer process orientation for inexperienced users............................................... 60

**A Protocol for Outside Counsel** ..................................................................................... 61

1. Be sure you can pursue the client's goals expeditiously. .............................................. 61

2. Memorialize early assessment and client understandings........................................... 62

3. Select arbitrators with proven management ability. Be forthright with the arbitrators regarding your expectations of a speedy and efficient proceeding........ 62

4. Cooperate with opposing counsel on procedural matters........................................ 63

5. Seek to limit discovery in a manner consistent with client goals............................. 64

6. Periodically discuss settlement opportunities with your client. ................................. 64

7. Offer clients alternative billing models....................................................................... 65

8. Recognize and exploit the differences between arbitration and litigation................. 65

9. Keep the arbitrators informed and enlist their help promptly; rely on the chair as much as possible................................................................. 66

10. Help your client make appropriate changes based on lessons learned ................. 66

11. Work with providers to improve arbitration processes.............................................. 67

12. Encourage better arbitration education and training................................................. 67

**A Protocol for Arbitrators** ............................................................................................. 68

1. Get training in managing commercial arbitrations....................................................... 68

2. Insist on cooperation and professionalism................................................................. 68

3. Actively manage and shape the arbitration process; enforce contractual deadlines and timetables......................................................................... 69

4. Conduct a thorough preliminary conference and issue comprehensive case management orders. .............................................................................................................. 70

5. Schedule consecutive hearing days. ............................................................................ 72

6. Streamline discovery; supervise pre-hearing activities............................................... 72
8. Be readily available to counsel. ................................................................. 74
9. Conduct fair but expeditious hearings...................................................... 74
10. Issue timely and careful awards. ............................................................... 76

Appendices ............................................................................................................ 77

Appendix A: Bibliography/Helpful Sources ....................................................... 77
Appendix B: Summit Sponsors ........................................................................... 81
Appendix C: Members of the Summit Planning Committee ............................... 82
Appendix D: Members of the Summit Task Forces ........................................... 83
Appendix E: Summit Participants ...................................................................... 85
Appendix F: Contributors ............................................................................... 87
Foreword

The College of Commercial Arbitrators was established in 2001. Its mission is to promote the highest standards of conduct, professionalism and ethics in commercial arbitration, to develop “best practices” guidelines and materials, and to provide peer training and professional development. Its membership currently consists of approximately two hundred leading commercial arbitrators in the United States and abroad.

In response to mounting complaints that commercial arbitration has become as slow and costly as litigation, thus substantially diminishing its appeal, the College decided in 2008 to convene the following year a National Summit on Business-to-Business Arbitration to identify the chief causes of the problem and explore concrete, practical steps that can be taken now to remedy them. The concept of a National Summit sprang from two key insights: (1) lengthy, costly arbitration results from the interaction of business users, in-house attorneys, the institutions that provide arbitration services, outside counsel and arbitrators; and (2) all of these “stakeholders” must collaborate in identifying and achieving desired efficiencies and economies in arbitration. Therefore, in addition to its own Fellows, who have considerable experience and expertise as commercial arbitrators (and, in many cases, as advocates), the College invited to the National Summit in-house counsel from numerous major companies that utilize arbitration, skilled advocates who represent such parties in arbitration in a wide variety of geographic regions and commercial specialties, and individuals who occupy key positions in leading institutional providers of arbitration services.

In anticipation of the Summit, the College appointed Task Forces composed of corporate counsel, outside counsel and arbitrators to study the issues and provide insight and perspective concerning the problems and possible solutions. Thereafter, the College’s Summit Planning Committee carefully reviewed submissions from the Task Forces and developed a Draft Report for discussion at the Summit. The Report, edited by Fellows Professor Thomas Stipanowich, Curtis von Kann and Deborah Rothman, concluded with four Protocols containing proposed action steps for Business Users and In-House Counsel, Arbitration Provider Institutions, Outside Counsel and Arbitrators. The Draft Report, entitled “How to Drastically Reduce Cost and Delay in Commercial Arbitration,” was circulated to all Summit invitees in the early fall of 2009.

The National Summit was convened in Washington, D.C. at the end of October, 2009. A measure of the perceived importance of the Summit was the fact that five of the principal organizations involved in commercial arbitration, namely, the American Bar Association Section of Dispute Resolution, the American Arbitration Association, JAMS, the International Institute

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1 As used in the draft report and in this publication, the term “commercial arbitration” refers to arbitration between two or more commercial entities, i.e., business-to-business arbitration. Neither the Summit nor this report has attempted to address the rather separate and distinct issues that arise in arbitration between businesses and employees or consumers. While those scenarios are certainly worthy of thoughtful study and attention, they are beyond the scope of the present initiative. Furthermore, although the recommendations offered herein may be of great benefit in the context of international arbitration, the focus of this report is on commercial arbitration in the United States.
for Conflict Prevention and Resolution ("CPR"), and the Chartered Institute of Arbitrators, joined the College as co-sponsors of the Summit, along with the Straus Institute for Dispute Resolution of Pepperdine University School of Law and seventy-two Fellows of the College.

More than 180 individuals participated in the Summit, which was designed as a structured "conversation" to elicit participants' input on the proposed Protocols. Following panel presentations regarding each of the four Protocols (conducted by corporate counsel, outside counsel, arbitrators and executives of "provider" institutions), Summit participants had the opportunity to comment on the proposals and recommend amendments or additions. The Summit concluded with a "town hall" meeting during which electronic voting devices were used to gauge the opinion of Summit participants concerning specific action steps.

In the course of producing this Final Report, the Editors thoroughly analyzed the results of the National Summit as well as numerous additional written recommendations for the improvement of the draft Protocols and made material revisions to those documents. The Protocols and accompanying commentary are designed to produce simple and straightforward guidance for all stakeholders with the intent of encouraging efforts that promote more expeditious and cost-effective arbitration. The commentary provides information on numerous procedural options and tools designed by various organizations to promote the goals and fulfill the action steps set forth in the Protocols.

The College expresses its deep gratitude to all of the Summit sponsors as well as the many individuals and organizations that helped plan, organize and produce the National Summit and Protocols. While the views and opinions of all participants were extraordinarily valuable in producing this report, the report is ultimately that of the College which takes full responsibility for any deficiencies that may be found in the document.

It is the fervent hope of the College of Commercial Arbitrators that publication of these Protocols will sound a clarion call to action by all constituencies involved in business arbitration, encouraging prompt adoption of effective measures to dramatically reduce process costs and delay, restoring arbitration to its rightful place as a valuable and efficient alternative to litigation in the resolution of business disputes.

Bruce W. Belding  
President of the College 2008-2009

Curtis E. von Kann  
President of the College 2009-2010

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2 The Protocols target ways to reduce cost and delay because those factors are the focus of most current complaints about commercial arbitration. Economy and efficiency are usually among the key concerns of arbitrating parties, but these goals may be in tension with, and may even be outweighed by, a desire for court-like due process. In any event, the Protocols' value will be in direct proportion to parties' desire to promote economy and efficiency in arbitration.
About the Editors

Thomas J. Stipanowich, William H. Webster Chair in Dispute Resolution and Professor of Law at Pepperdine University School of Law and Academic Director of the Straus Institute for Dispute Resolution, has had a distinguished career as a scholar, teacher, and leader in the field as well as a commercial and construction arbitrator and mediator, federal court special master, and facilitator. From 2001 until mid-2006, he served as CEO of the International Institute for Conflict Prevention & Resolution (CPR); prior to that time he was a litigator with a national construction law firm and, for fourteen years, a chaired professor of law. He was co-author with Ian Macneil and Richard Speidel of the much-cited multi-volume treatise Federal Arbitration Law (Little, Brown & Co. 1994). He edited Commercial Arbitration at Its Best (ABA 2001), the report of the CPR Commission on the Future of Arbitration. He co-authored a groundbreaking book and materials for law schools entitled Resolving Disputes: Theory, Practice, and Law (Aspen Publishing, 2d ed. 2010). In 2008 he was awarded the highest honor of the ABA Dispute Resolution Section, the D’Alemberte-Raven Award, for contributions to the field of conflict resolution. He has twice (1987, 2010) received the CPR Best Professional Article award, most recently for “Arbitration: The ‘New Litigation’” and “Arbitration and Choice.” He is one of very few individuals accorded the title of Companion by the Chartered Institute of Arbitrators. He holds a Bachelors (with highest honors) and Masters in Architecture as well as a Juris Doctor (magna cum laude, Order of the Coif) from the University of Illinois. He is an arbitrator and mediator with JAMS.

Curtis E. von Kann, a graduate of Harvard College and Harvard Law School, was a civil litigator for sixteen years, principally as an associate, then partner in the Washington, DC law firm of Hogan & Hartson. In 1985 President Ronald Reagan appointed him a Judge of the District of Columbia Superior Court where he presided over hundreds of jury and non-jury trials and was a principal designer of the Court’s highly successful civil case management and ADR program. Since 1997 he has served as a full-time arbitrator and mediator in the Washington office of JAMS and has written and spoken widely on a variety of ADR topics. He is currently President of the College of Commercial Arbitrators and was Editor-in-Chief of the first edition of the College’s Guide to Best Practices in Commercial Arbitration.

Deborah Rothman, a magna cum laude graduate of Yale College, received her Masters in Public Affairs from the Woodrow Wilson School at Princeton University and her Juris Doctor from NYU School of Law. After practicing law with Manatt Phelps in Los Angeles, she became President and CEO of Baby Fair Enterprises. Since 1991, she has been a full-time mediator and arbitrator with the American Arbitration Association in New York and Los Angeles, specializing in business, entertainment, franchise, intellectual property and employment matters. She also provides arbitration consulting services in high-stakes arbitrations and has been on the Board of the College of Commercial Arbitrators since 2003.
I

Speed, Economy and Efficiency in Commercial Arbitration: Failed Expectations, Shared Responsibility

Despite meaningful efforts to promote better practices and ensure quality among arbitrators and advocates, criticism of American commercial arbitration is at a crescendo. Much of this criticism stems from the fact that business-to-business arbitration has taken on the trappings of litigation—extensive discovery and motion practice, highly contentious advocacy, long cycle time and high cost. While many business users still prefer arbitration to court trial because of other procedural advantages, the great majority of complaints being voiced by arbitration users are the same: commercial arbitration now costs just as much, and takes just as long, as litigation. Clients and counsel often wonder aloud what happened to the economical and efficient alternative to the courtroom.

As a result, some business clients and counsel have removed arbitration clauses from their contracts. This situation has also contributed to the removal of arbitration provisions
from important standard industry contract forms. As one West Coast in-house counsel recently reported,

We really sell arbitration to our business clients [as a superior alternative to litigation]. Now they are accusing us of false advertising. . . . Literally all of the top general counsel from the largest corporations in the Bay Area were uniform in their frustration with arbitration and many have said . . . they’re not agreeing to it anymore.

Such outcomes are unfortunate, because commercial arbitration offers businesses the prospect of a true alternative to litigation—indeed, a spectrum of alternatives. While litigation may prove desirable to parties who require public proceedings, case precedents, and the contempt power of courts, arbitration offers the inestimable range of advantages that come with choice—the ability to tailor the process to the dispute. For this key reason, arbitration should always be a prominent contender in the marketplace of alternatives for resolving business disputes.

In recent years, to be sure, much effort has been devoted to providing guidance for arbitrators, business users and advocates. In addition, leading dispute resolution provider institutions have spent considerable time and effort developing and revising arbitration procedures. Despite all of this, the problems—perceived and real—remain.

At the October 2009 National Summit on Business-to-Business described in the Foreword to this report, the views of all participants—including corporate counsel, outside counsel, arbitrators and executives of institutions providing arbitration and other dispute

8 The latest edition of the American Institute of Architects construction forms, the nation’s most widely used template for building contracts, eliminates the default binding arbitration provision, long a sine qua non of construction contracts; parties must henceforth affirmatively agree to arbitration by checking a box or, by default, go to court. See AIA DOCUMENT A201-2007, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, art. 15 (2007); AIA DOCUMENT B101-2007, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT, art. 8 (2007). A new much-heralded rival set of standard contract documents also relegates arbitration to an option rather than a default procedure. CONSENSUSDOCS 240, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT/ENGINEER, art. 9.5 (2007).

9 Advocates of arbitration are quick to point out that arbitration awards are likely to prove much more “final” than court judgments, tending to substantially reduce post-hearing process time and costs. Moreover, arbitration offers parties a host of opportunities to craft a process that proves vastly superior to litigation in many cases, such as the ability to choose their decision maker(s) (including subject matter experts), procedures and venue. Parties may also identify the issues that will (and will not) be arbitrated, help set the timetable for the process, and take steps to ensure the confidentiality of proceedings and of documents disclosed during the process. For any or all of these reasons arbitration may be an appealing alternative to litigation regardless of the relative cost and length of arbitration. See, e.g., Curtis E. von Kann, A Report Card on the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek, 7 DEPAUL BUS. & COM. L.J. 499 (2009) (concluding that commercial arbitration does quite a good job of meeting user expectations concerning their ability to choose the decision-maker, the opportunity to adapt the process to the needs of individual cases, flexibility in the adjudicative process, privacy of the adjudicative process, accessibility of the decision-maker, efficient and user-friendly case administration, fair and just results, and finality of the decision). Nevertheless, the perception that arbitration processes are unacceptably slow and costly—and in this respect not a demonstrably superior alternative to litigation—has tainted arbitration in the eyes of many business clients and counsel.
resolution services—were sought by means of a "town hall" meeting and electronic voting. While not a scientific survey, the voting data reflected important levels of consensus about the depth of user concerns about arbitration, the roots of those problems, and potential solutions.

Summit participants overwhelmingly believed that relative speed, efficiency and economy tend to be important to business users of arbitration.

*How often do business users desire arbitration to be speedier, more efficient and more economical than litigation?*

Moreover, to one degree or another, nearly all participants were convinced that arbitration falls short of users' expectations regarding speed, efficiency and economy at least some of the time. Seven in ten were convinced that this occurred *at least half the time:*

*In your experience, how often does arbitration fail to meet the desires of business users when they want speed, efficiency and economy?*

Even if these collective perceptions exaggerate to some extent the gap between business users' expectations of arbitration and their actual experiences, there is considerable room for concern.

In order to address this disquieting *status quo,* the Summit focused on identifying the perceived roots of the problem and exploring potential solutions.
II
The Root of the Problem:
Arbitration Has Become Too Much Like Litigation

A. Reduced Use of Trial; Growth of Commercial Arbitration

Over the past three decades large, complex business disputes that used to be filed in court, typically federal court, have been increasingly brought to commercial arbitration. Several factors have contributed to this trend.

A recent ABA Symposium on "The Vanishing Trial" spotlighted an 84% decrease in the percentage of federal cases resolved by trial between 1962 and 2002, and significant parallel declines in state courts. The dramatic fall-off in the rate of trial may be attributed in large part to concerns about the high costs and delays associated with full-blown litigation, its attendant risks and uncertainties, and its impact on business and personal relationships. Businesses have become increasingly gun-shy about entrusting their financial success, even their continued existence, to unpredictable juries or autocratic judges (often with little or no pertinent legal or commercial background or experience). Their first and foremost concern, however, is the costliness and slowness of litigation: in the blunt words of a recent report by a task force of the American College of Trial Lawyers and the Institute for Advancement of the Legal System, "because of expense and delay, both civil bench trials and civil jury trials are disappearing."12

The concerns that contributed to the waning of civil litigation offered opportunities for the growth of private adjudication through binding arbitration.13 Conventional wisdom—and common sense—suggests that businesses choose binding arbitration mainly because it is perceived to be superior to litigation in some or all of the following ways: cost savings, shorter


13 As one experienced commercial dispute resolution lawyer explains, "Nature abhors a vacuum, and a vacuum has been created with the decreased frequency of bench and jury trials. This portends good things for alternative dispute resolution processes."

14 William H. Knell, III & Noah D. Rubins, Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?, 11 AM. REV. INT’L ARB. 531, 532 (2000); Richard E. Speidel, Securities Arbitration: A Decade after McMahon,
resolution times, a more satisfactory process, expert decision makers, privacy and confidentiality, and relative finality.\textsuperscript{15} The untiring efforts of arbitration providers in promoting commercial arbitration rules and standard model clauses have encouraged broader use of arbitration in recent decades, while the growth of a large cadre of relatively sophisticated, accomplished, and well-trained professional arbitrators has undoubtedly enhanced confidence that arbitration will produce a reasonable and fair result. A wide variety of simple as well as sophisticated contractual provisions for the resolution of disputes by arbitrators are now featured in many different kinds of commercial contracts.\textsuperscript{16} These phenomena, coupled with plenary judicial enforcement of broadly tailored arbitration provisions, have made arbitration a wide-ranging surrogate for trial in a public courtroom.\textsuperscript{17}

\textbf{B. Importation of Trial Practices into Arbitration}

Commercial arbitration is, to a large extent, a victim of its own success. The migration of commercial cases from litigation to arbitration has, predictably, brought into arbitration some of the practices associated with commercial case litigation. Many skilled and experienced attorneys, while happy to accept the foregoing advantages of arbitration, nonetheless generally want to try cases in arbitration with the same intensity and the same tactics with which they were conducted in court. Thus, expanded arbitral motion practice and discovery have developed within the framework of standard commercial arbitration rules which tend to afford arbitrators and parties considerable "wiggle room" on matters of procedure. As a consequence, practice under modern arbitration procedures is today often a close, albeit private, analogue to civil trial.

Aside from the natural human tendency to want to do things "the way we've always done them," there are other drivers of the incorporation of litigation-style proceedings into large commercial arbitration. Litigators, being inherently conservative and cautious, on the one hand, and determined to achieve the best possible result for their clients, on the other, are very reluctant to try a big case—in either a court or an arbitration proceeding—until they have sought all possible evidence, analyzed every issue, and played every legal card at their disposal. If, notwithstanding all these efforts, the client suffers an adverse result, counsel can say with confidence that this did not occur because they held back on any actions that might have produced a better outcome. It must be noted, finally, that these practices—constituting the arguable path of prudence—are also significant contributors to law firm revenues.


\textsuperscript{17} See Thomas J. Stipanowich, \textit{Contract and Conflict Management}, 2001 Wis. L. REV. 831, 839-44.
1. Discovery

Among many aspects of this phenomenon, the expansion of discovery stands out as the primary contributor to greater expense and longer cycle time, as affirmed by a poll of National Summit participants:

*If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent does excessive discovery tend to contribute to that result?*

Arbitration hearings are now often preceded by extensive discovery, including requests for voluminous document production and depositions. Since discovery has traditionally accounted for the bulk of litigation-related costs, the importation of discovery into arbitration (which traditionally operated with little or no discovery) is particularly noteworthy. Although many arbitrators and some arbitration rules aim to hold the line on excessive discovery, it is not unusual for legal advocates to agree to litigation-like procedures for discovery, even to the extent of employing standard civil procedural rules. This should not be surprising, since there

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19 See, e.g., *INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION (CPR) NON-ADMINISTERED ARBITRATION RULES* R. 11 (2007) ("The Tribunal may require and facilitate such discovery as it shall determine is appropriate...taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.") See also *JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES*, R. 22 (2007); *AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES* R. 30 (2009).

20 In some cases arbitrators are confronted by a prior agreement of counsel for arbitrating parties to utilize the discovery provisions of the Federal Rules of Civil Procedure in arbitration. This poses a dilemma for the arbitrator, who may or may not be able to persuade counsel to forego requests for admission and interrogatories and to strictly limit the number of depositions, and also to closely supervise the discovery process to avoid unnecessary delays.
is a tendency to use the tools with which one is most familiar, and lawyers schooled in trial may predictably rely on their knowledge and experience in the private analog of the process. Trial practice, with its heavy emphasis on intensive discovery and related motion practice, is reinforced by ethical rules enshrining the model of zealous advocacy.\textsuperscript{21} For lawyers accustomed to full-fledged discovery, anything less may seem tantamount to malpractice.\textsuperscript{22}

It is not hard for American lawyers to justify intensive discovery to themselves and their clients. Legitimizing a legal position often requires painstaking reconstruction of past events, a highly labor- and time-intensive activity that may require conscientious sifting of vast amounts of information, most of which is of little or no relevancy. The expectation—or hope—is that the "mining" effort will ultimately produce a picture that supports the position.\textsuperscript{23} Alternatively, it might at least forestall an undesired resolution for months or years.\textsuperscript{24}

Business clients—especially those with significant interests or assets at stake—are often disinclined to challenge this effort to mine information. They may agree with or rely on the advocate's preliminary counsel that the mining operation will yield productive results;\textsuperscript{25} indeed, they may have strategic reasons for using discovery to increase their opponent's costs, and/or delay the final resolution of the dispute.\textsuperscript{26}

Arbitrators, intent upon striking a balance between fundamental fairness and efficiency, may be reluctant to push parties to limit such practices or to keep to schedule, especially when all parties have agreed to wide-ranging discovery. These tendencies are likely to be reinforced by the reality that arbitration is founded on an agreement between the parties, leading to the common and reasonable perception that arbitrators have no business second-guessing agreements between counsel regarding the conduct of discovery and other procedures. There are also concerns about an arbitration award being subjected to a motion to vacate based on a failure to consider relevant evidence, especially among arbitrators who lack the confidence of long experience.\textsuperscript{27} Some have even suggested that a reluctance to limit discovery may reflect an arbitrator's desire to avoid offending anyone in the hope of securing future appointments.\textsuperscript{28}

\begin{footnotes}
\item[22] John Hinchey, Remarks at the Annual Meeting, American College of Construction Lawyers, Adjudication: Coming to America (Feb. 22, 2008) (notes on file with author).
\item[25] Carr & Jencks, supra note 23, at 240.
\item[26] See Sorenson, Jr., supra note 23, at 699-700. Discovery has been used as a tactical weapon to impose excessive costs on the opposing party.
\item[27] There is little case law in this area to provide guidance and reassurance to arbitrators who might otherwise be inclined to more rigorously impose limits over counsel’s objection. In Hicks v. UBS Financial Services, Inc., 649 Utah Adv. Rep. 7 No 20080950-CA, filed Feb. 4, 2010 UT, App 26, the Utah Court of Appeals held that "erroneous
For all of these reasons, discovery under standard arbitration procedures has tended to become much like its civil court counterpart. As one corporate general counsel explains:

[I]f you simply provide for arbitration under [standard rules] without specifying in more detail . . . how discovery will be handled . . . you will end up with a proceeding similar to litigation.29

All too often, lamented another corporate lawyer at the National Summit, this expensive, "overblown" process results in little or no useful information, let alone the proverbial "smoking gun."

With the advent of electronic discovery—producing what was recently termed "a nightmare and a morass" for parties in litigation,30 the costs and stakes of litigation-style discovery have never been higher. Never, moreover, has the need to control discovery in arbitration been more imperative.

2. Motion practice

Another key source of cost and delay in commercial arbitration is motion practice, as reflected in the poll of National Summit participants:

*If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent does excessive, inappropriate or mismanaged motion practice tend to contribute to that result?*

![Bar chart showing distribution of responses to the motion practice question.]

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The use of dispositive motions in arbitration—now contemplated even by some expedited rules\textsuperscript{31}—is, practically speaking, a double-edged sword.\textsuperscript{32} This import from the court system, prudently employed, is a potentially useful tool for narrowing arbitral issues prior to hearings and full-blown discovery, thus avoiding unnecessary preparation and hearing time. While arbitrators are properly chary of summarily disposing of matters implicating factual issues, there are certain matters that may be forthrightly addressed early on with little or no discovery, such as contractual limitations on damages, statutory remedies, or statutes of limitations and other legal limitations on causes of action.\textsuperscript{33} The problem is that, as in court, motion practice often contributes significantly to arbitration cost and cycle time without clear benefits. The filing of motions leads to the establishment of schedules for briefing and argument entailing considerable effort by advocates, only to have the arbitrators postpone a decision until the close of hearings because of the existence of unresolved factual disputes raised by the motion papers.\textsuperscript{34}

3. Other concerns

Another contributor to cost and delay is hearings that drag on too long, as reflected in the poll of National Summit participants:

\textit{If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent do too-lengthy hearings tend to contribute to that result?}

\begin{center}
\begin{tikzpicture}
\begin{axis}[
    width=\textwidth,
    height=\textwidth,
    ybar,
    ymajorgrids=true,
    bar width=20pt,
    symbolic x coords={Not at all, Moderately, Very much},
    xtick=data,
    nodes near coords,
    nodes near coords align={vertical},
    ymin=0, ymax=40,
]
\addplot coordinates {
(Not at all, 6)
(Moderately, 31)
(Very much, 34)
};
\addplot coordinates {
(Not at all, 0)
(Moderately, 18)
(Very much, 11)
};
\end{axis}
\end{tikzpicture}
\end{center}

\textsuperscript{31} See, e.g., JAMS ENGINEERING/CONSTRUCTION EXPEDITED RULES, Rule 18 (2009).


\textsuperscript{33} COMMERCIAL ARBITRATION AT ITS BEST, supra note 14, at 48, 53-55. The new Final Report on Litigation Reform states that "parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution." \textit{Final Report on Litigation Reform, supra} note 12, at 22. It also calls for "a new summary procedure . . . by which parties can submit applications for the determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials." \textit{Id.} at 6.

\textsuperscript{34} See Romaine L. Gardner, Depositions in Arbitration: Thinking the Unthinkable, 1131 PRACTICING LAW INST. CORP. LAW & PRACTICE COURSE HANDBOOK 379, 389-97 (Jul.-Aug. 1999).
As with discovery and motion practice, the cause of drawn-out hearings is often a complex interaction of several factors. It typically starts with attorneys, intent on pursuing their brand of "zealous advocacy" for strategic or tactical reasons, interposing constant objections, introducing redundant testimony, and framing the same question over and over again. It is facilitated by arbitrators who are unable or unwilling to come down too heavily on the parties—perhaps because of lack of skill or native discomfort with proactive management, or because they may be uncomfortably aware of scheduling issues of their own that may need to be accommodated during the course of trying a complex case. The ballooning of hearing time is especially likely within the ambit of open-ended arbitration procedures with considerable "wiggle room"; however, even previously established timetables and prescribed deadlines sometimes fall by the wayside due to mindsets like those described above.

C. **Looking Beyond Litigation-Style Arbitration**

When effectively managed by competent arbitrators with the cooperation of counsel, a "hybrid system" which combines the basic features of arbitration (process control, confidentiality, finality and chosen expert decision-maker) with court-like discovery, motion practice, and the like is not inherently bad, and may be a perfectly sensible arrangement for some kinds of disputes. For example, a rational choice might be made in favor of such an approach, despite the prospect of expense and extended process, where the stakes are very high.

In many cases, the case management efforts of skilled arbitrators and/or the cooperation of party representatives will result in a highly satisfactory procedure that is carefully tailored to the circumstances at hand—the result, presumably, that was intended by the drafters of standard arbitration procedures that contain significant "wiggle room." In such circumstances, whether by conscious choice or dumb luck, business users enjoy an arbitration experience fully commensurate with their needs and priorities.

But, while some business clients may be perfectly comfortable with this *status quo*, in which the character, length and cost of the arbitration process are heavily dependent on the interaction of arbitrators and advocates, many others are emphatically not. They desire a higher degree of control—and modes of arbitration that deliberately place greater emphasis on economy and efficiency. Consider, for example, the complaint of two in-house attorneys for one of the world's leading companies:

The overriding objectives [of businesses in choosing an appropriate forum for resolving disputes] . . . are fairness, efficiency (including speed and cost) and certainty in the enforcement of contractual rights and protections. These are complementary objectives, and to focus on one at the expense of the others leads to a result inconsistent with the expectations of the business world and denies basic commercial needs. Too often the practice of . . . arbitration has
done just that, by focusing on perceived concepts of due process to the detriment of efficiency, resolution and certainty.\textsuperscript{35}

Although this quote refers to commercial arbitration in cross-border disputes, it is perhaps even more relevant in the context of arbitration in the U.S. As one director of litigation for a multinational company observed at the National Summit, "I'm here to tell you that . . . our current experience is that we are getting quicker and more cost-effective results in U.S. courts!"

Besides driving up costs, delay in the resolution of conflict prolongs uncertainty—potentially postponing the collection of amounts owed, affecting the setting of required financial reserves and impairing the reporting of profits, and leaving in doubt questions of contract interpretation. Thus, "[w]hile business leaders . . . expect a fair resolution, taking excessive time can often be just as damaging as a wrong decision."\textsuperscript{36}

While concerns about speed, efficiency, economy and certainty have led many businesses to stop using arbitration, the solution is a lot less drastic. Instead of accepting without question a set of arbitration rules that fails to lay the groundwork for effective cost- and time-saving, business users’ best chance to achieve harmony between process and business priorities is to take affirmative steps to move beyond the one-size-fits-all approach.

Powerful support for this conclusion comes from the recent report of the American College of Trial Lawyers task force linking the disappearance of civil trials with high cost and delay: the report recommends a wide range of critical changes in the landscape of American litigation, including an end to the "'one size fits all' approach of the current federal and most state rules."\textsuperscript{37} If clear procedural choices are perceived as not just desirable but essential in litigation, the same should be \textit{even more so in arbitration}—since arbitration is almost wholly a creature of contract and therefore highly amenable to choices that “fit the forum to the fuss.”\textsuperscript{38}

In the litigation system, speed and economy have sometimes been achieved by court order. For years, a handful of state and federal courts have managed to resolve their civil cases much faster, with attendant cost savings, than their peers. While such expedition sometimes results from unique factors, such as abnormally low case loads, in most instances the time and cost savings occur because the court has adopted a successful vehicle for containing the proceedings. For example, the U.S. District Court for the Eastern District of Virginia has been for many years one of the fastest federal trial courts in the country. It did this without any effort to micromanage proceedings in its cases. Instead, it instituted a case management program in which all civil cases (no matter how complex) were set for trial approximately six months after service of process on defendants, all motions were immediately heard and decided (usually from the bench at hearing), and continuances were virtually never granted.

\textsuperscript{35} Michael McIlwrath & Roland Schroeder, \textit{The View from an International Arbitration Customer: In Dire Need of Early Resolution, 74 ARBITRATION 3, 4 (2008).}

\textsuperscript{36} Id. at 4-5.

\textsuperscript{37} See \textit{FINAL REPORT ON LITIGATION REFORM, supra note 12.}

\textsuperscript{38} Frank E. A. Sander & S. Goldberg, \textit{Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure, 10 NEGOT. J. 49 (1994).}
This arrangement, which came to be known as "the rocket docket," soon became the distinguishing feature of the court's reputation and legal culture. Attorneys who had cases there quickly focused their discovery efforts on the most important evidence, eschewed any attempt to track down every marginal lead or possibility, and generally cooperated in discovery and pre-hearing activities (knowing that failure to cooperate would be quickly sanctioned).

This highly successful cost and time containment program is firmly grounded in the universal truth known as Parkinson's Law—to wit, "work expands so as to the fill the time available for its completion."39 (This is particularly true, one might add, when those doing the work—outside counsel and arbitrators—are paid by the hour.) Some containment mechanism is an essential ingredient of any successful effort to reduce transaction costs and cycle time.

Unfortunately, while external imposition of such a containment mechanism is readily achievable in litigation (though, regrettably, seldom done), it is not in arbitration. The undoubted broad discretion granted trial judges to manage their calendars and proceedings, vests them with authority to impose reasonable restrictions on discovery, motions, and trial time even if all parties vigorously object. Arbitrators, by contrast, have only such power as is conferred by party agreement. If all arbitration parties agree that each should be able to take twenty depositions, file dispositive motions both before and after discovery, and have twenty days to present their evidence at hearing, an arbitrator who recognizes that a fair and just decision could be reached through a much more abbreviated proceeding may try to persuade the parties to drastically scale back. If unable to use persuasion, however, the arbitrator is powerless to override the parties' agreement on how the arbitration shall be conducted.40 As noted above, moreover, arbitrators may have other reasons not to push back too strenuously when confronted with an unduly expansive proceeding.

If the intent is to have an expeditious and economical process, therefore, it is incumbent upon business clients and counsel to establish the appropriate framework at the outset, preferably when laying the contractual foundation for arbitration, and thereafter to reinforce those choices by other choices during the course of arbitration. It is axiomatic that the less pre-dispute effort is made to establish an appropriate framework for containing the arbitration, the more likely it is that the arbitration proceedings will spiral out of control, with ad hoc decisions being made at the discretion of the arbitrator in this effort.

But business users cannot be expected to act unilaterally. First and foremost, business users need assistance from reputable providers of arbitration and dispute resolution services in the form of clear, user-friendly procedural choices—including procedures that make speed and economy a true priority. Second, they need outside counsel willing and able to share and promote the values of efficiency and economy during the arbitration process. Finally, they need arbitrators with effective management skills and the audacity to use them.

In the following part we will more closely examine the roles of each of these parties.

39 This adage initially appeared in The Economist of November 1955 as the first sentence of a humorous essay by Cyril Northcote Parkinson and was later reprinted with other essays in the book Parkinson's Law: The Pursuit of Progress (London, John Murray, 1958).

40 This sort of agreement is far from fanciful, as many experienced arbitrators can attest.
III

Business Users & In-House Counsel, Providers, Outside Counsel and Arbitrators Must All Play a Role in Promoting Efficiency and Economy in Arbitration

A. The Need for a Mutual Effort

It is time to return to fundamentals in American arbitration. Those who seek economy, efficiency and a true alternative to the courthouse need more than good arbitrators. Real change must begin with the commitment of business users to thoughtful, informed consideration of discrete process choices that lay the groundwork for a particular kind of arbitration—whether they seek a highly streamlined, short and sharp process with tight time frames and firmly bounded discovery, a private version of federal court litigation or something in between. In the absence of specific user guidance, arbitration under modern, broadly discretionary procedures is primarily a product of the interaction of advocates and arbitrators, even the best of whom have limited ability, absent a contractual mandate or the stipulation of all parties to blend efficiency and economy with fundamental fairness. All too often, the result is a process that looks and feels like litigation—which is not what the parties expected in electing arbitration over court trial.

For business users, process choice is an illusion in the absence of appropriate alternative process prototypes from arbitration provider institutions. Even before a dispute arises, at which time heated emotions prevent agreement on something as simple as expedited arbitration rules, clients and counsel tend to have neither the time nor the expertise to craft their own process templates and usually need straightforward, dependable guidance from those who develop and administer the procedures upon which they rely. Provider institutions are awakening to the need to promote real choices in arbitration, but much remains to be done.

Users also require outside counsel able and willing to support and further the goals underpinning their agreement to arbitrate. Among those who promote themselves to business clients, there are wide variations in personal philosophy, approach, pertinent knowledge and ability.

Finally, efficient and economical process depends upon the active efforts of arbitrators to employ effective process management skills, coupled with the discernment and willingness to make early rulings that will effectively truncate or streamline proceedings and the fortitude to enforce agreed timetables. To the extent that business users fail, consciously or unconsciously, to place firm limits on the arbitration timetable, the scope of discovery, and other arbitration procedures, the process management skills of arbitrators—and their interaction with counsel—become all the more critical to an efficient proceeding and speedy outcome.

In the following pages we will examine in detail the roles of each of these four groups of "stakeholders" in the arbitration process, all of which are critical to achieving efficiency and economy in arbitration.
**B. The Role of Business Clients and Counsel**

Participants at the National Summit thought corporate in-house counsel can do considerably more to ensure speed, efficiency and economy before disputes arise. Perhaps surprisingly, the in-house counsel participants themselves overwhelmingly agreed with this statement.

> When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can corporate in-house counsel do to help fulfill those expectations before disputes arise?

Of the four constituencies, corporate in-house counsel are best-equipped to assess client goals and priorities across and within transactions. Where speed, economy and efficiency are critical to a client, they have the opportunity to tailor dispute resolution provisions (including binding arbitration) to those particular needs.

Summit participants also believed that corporate in-house counsel could do a good deal more to fulfill client expectations about speed, efficiency and economy later on, in the course of resolving particular disputes:

> When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can corporate in-house counsel do to help fulfill those expectations once the decision is made to arbitrate a dispute?

Rather than "turn over the keys" and relinquish control to outside counsel, in-house attorneys have repeated opportunities to affect the arbitration process, from selection and supervision of counsel to the identification of arbitrators to helping to chart the course of the arbitration process.
1. The Importance of Effective Choice-Making

Business users, guided by knowledgeable and experienced counsel, are in the best position to determine how and when arbitration will be brought to bear on business disputes, and what kind of arbitration process to prescribe. If business parties really want arbitration to be a truly expeditious and efficient alternative to court, they have to assume control of the process and not delegate the responsibility to outside counsel—in other words, principals, and not agents, should act as principals.41 This must include not only choices made after disputes arise, but also active choice-making at the time of contracting. Ideally, it begins even earlier with strategic discussions regarding the management of conflict in which arbitration is considered among a variety of tools and approaches.42

Indeed, at first blush, it would seem that businesses that are incurring excessive transaction costs and delays would be ideally situated to rein them in. Businesses are typically quite experienced in making cost-benefit analyses and in deciding how much they are willing to pay to reduce particular risks to a tolerable level. Experienced counsel (and arbitrators) know, for example, that the law of diminishing returns applies in discovery as it does in nearly everything else. The vast majority of cases end up being decided on the basis of a fairly small body of evidence which is usually obtained in early discovery (or may even be known when the arbitration demand is filed). Continued efforts to turn over every stone and run down every possible lead rarely produce important further evidence (the proverbial "smoking gun") but invariably drive up transaction costs and time greatly. If given the choice between spending $200,000 to achieve 90% assurance of locating most of the important evidence or spending $2,000,000 to achieve 95% assurance, most sophisticated businesses would usually opt for the first choice, while their risk-averse, hourly-billing counsel would often opt for the second.

2. Reasons Business Clients and Counsel Fail to Take Control and Make Effective Choices

Unfortunately, most businesses have not availed themselves of the opportunity to control arbitration costs and speed by adopting arbitration agreements that impose reasonable limits on the arbitration process. Instead, companies tend to reflexively insert standard "boilerplate" arbitration provisions in their transaction contracts, many of which include relatively "loose" procedures that leave considerable leeway to outside counsel and arbitrators.

There appear to be several reasons for the failure of businesses to take active control of their arbitrations from the outset. First of all, it is often difficult to anticipate precisely what disputes will arise under a contract, and what the stakes will be.43 In-house counsel may feel that the simplest solution to such uncertainty is the adoption of arbitration provisions that leave considerable room for the arbitrators and counsel to adapt the process to whatever circumstances present themselves—the "wiggle room" to which we have alluded.

42 See GEORGE J. SIEDEL, USING THE LAW FOR COMPETITIVE ADVANTAGE 3 (2002).
43 See COMMERCIAL ARBITRATION AT ITS BEST, supra note 14, at 6-8.
Second, in most businesses, corporate energy and attention is focused on consummating transactions; in contrast dispute resolution provisions tend to be accorded low priority in contract negotiations, at least partly because raising the specter of conflict seems inappropriate when the emphasis is on coming together.\(^{44}\) Those insiders who say “but let's also make careful arrangements for what happens if things go wrong” risk being viewed as obstructionists who might derail the deal. Perhaps, too, some transactional lawyers are reluctant to make a negotiating point of arbitration, fearful that that may require trading off more "substantive" elements.

There is also the problem that transactional lawyers often lack direct experience with resolving post-negotiation conflict; for this reason they may have a tendency to fall back on inadequate boilerplate or falter in the minefield of customized drafting.\(^{45}\) In the effort to define client goals and translate them into meaningful process choices, in-house counsel, the "gatekeeper to legal institutions and facilitator of . . . transactions,"\(^{46}\) must play a critical role. But the pertinent knowledge and experience about dispute resolution is often reposed in litigators, not transactional counsel.

When disputes arise, moreover, there is undoubtedly a tendency on the part of in-house counsel to turn matters over to outside counsel and monitor outcomes and invoices but not actively co-manage the process. In this, perhaps, there is the perceived comfort of being able to delegate responsibility to another for the consequences of an adjudicative strategy. If the strategies are not in tune with the goals of the client, however, the consequences may be unfortunate, as reflected in the conclusion of one corporate general counsel:

> Arbitration is often unsatisfactory because litigators have been given the keys . . . and they run it exactly like a piece of litigation. It’s the corporate counsel’s fault [for] simply turning over the keys to a matter.\(^{47}\)

3. Business Clients and Counsel Must Change These Realities

Despite the often daunting obstacles confronting client and counsel regarding arbitration and dispute resolution, there are compelling reasons why in-house advisors should devote more time and energy to overcoming current obstacles and why business clients should heed and support their efforts. As detailed in Part IV, effective process choices can provide tangible benefits for business and avoid costly and delay-producing legal consequences, thus

\(^{44}\) See id.

\(^{45}\) John M. Townsend, Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins, 58 DISP. RESOL. J. 28, 30 (Feb.-Apr. 2003).


\(^{47}\) Stipanowich, Vanishing Trial, supra note 29, at 895 (quoting Jeffrey W. Carr, Vice President and General Counsel, FMC Technologies, Inc.). See also David B. Lipsky & Ronald L. Seeber, In Search of Control: The Corporate Embrace of ADR, 1 U. PA. J. LAB. & EMP. L. 133, 142 (1998); Craig A. McEwen, Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation, 14 OHIO ST. J. DISP. RESOL. 1 (1998); Lande, supra note 11.
fulfilling legal counselors’ ethical obligations to actively promote consideration of appropriate dispute resolution alternatives.

Selecting the right "template" is the first critical choice point for business users and in-house counsel. It is, however, essential to make other good choices after disputes arise. The selection of the right advocates and arbitrators can reinforce earlier process choices by ensuring adherence to the contractual arbitration "template;" the wrong outside counsel or arbitrator may undermine earlier procedural choices.

Finally, business clients and in-house counsel should recognize that, however skilled and committed their outside counsel, it is critical for the user to maintain overall control of the process of dispute resolution. This should begin with an early case assessment that sets the stage for strategic control of the conflict management process. As they do with other large expenditures, businesses should set an appropriate and realistic budget for arbitration and should forbid outside counsel from exceeding that budget without express approval. In-house counsel should attend, in person or by telephone, the initial case management conference and all important subsequent conferences and hearings during the arbitration process, should require periodic status reports from outside counsel, and should actively partner in the management of the arbitration rather than relinquishing such control to outside counsel.

C. The Role of Provider Organizations

National Summit participants also perceived that organizations providing arbitration services should play a major role in bridging the gap between user expectations and experiences regarding speed, efficiency and economy in arbitration:

When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can institutions that provide arbitration rules, panels and administrative services do to help fulfill those expectations?

Business users rely heavily on the organizations that publish and promote (a) arbitration and dispute resolution procedures, (b) lists of pre-screened, experienced arbitrators and other "neutrals" and (c) related administrative services. In many different respects, these "provider institutions" channel the expectations and behavior of business parties and the arbitrators that serve them and set the stage for the success or failure of arbitration. Their offerings should be closely examined and compared, but never taken for granted.
The published commercial arbitration procedures of major provider institutions offer a number of perceived advantages. For busy lawyers they offer a seemingly "tried and true" alternative to the minefield of customized drafting combined with an administrative support system and access to lists of pre-screened, trained neutrals. Many in-house counsel report that, unless a client is entering into an exceptionally significant commercial relationship or preparing a contract template that will be used multiple times, it is unrealistic to expect counsel to spend considerable time planning and drafting arbitration agreements. Even in circumstances where more attention is appropriate, drafting dispute resolution agreements from whole cloth without reliance on published templates can be a dicey proposition. It therefore makes sense to examine and compare what different administrative institutions have to offer.

The incorporation of a boilerplate arbitration provision is also much less likely to raise the eyebrows of those on the other side of the negotiating table. To the extent that national or regional entities are known and respected in the marketplace, incorporating their rules is less likely to entail a drain on negotiators' time or an expenditure of a party's "bargaining chips."

But while drafters seeking guidance from the websites of institutions sponsoring arbitration have a seemingly wide variety of choices, there are few readily available, reliable guideposts that dependably link specific process alternatives to the varying goals and expectations parties may bring to arbitration. Moreover, despite devoting a great deal of time and effort to developing and promoting institutional rules, most organizations offer a limited range of process templates for commercial arbitration. For example, some institutions heavily emphasize a single set of commercial arbitration rules which may be excellent for certain purposes but less advantageous for others (such as small and medium cases); by incorporating that institution's rules in an arbitration agreement, however, parties will be bound to employ those rules for whatever disputes arise. Relatively few procedures, for example, incorporate "tiered" approaches to dispute resolution in a single document.

Very recently, some providers that heretofore had published a single set of "one-size-fits-all" arbitration rules are starting to give more attention to the diverse needs of business

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49 Leading providers provide some basic guidance for drafters about ways of incorporating their own rules in the contract. See, e.g., AAA, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE (Amended and Effective September 1, 2007); JAMS GUIDE TO DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS (Rev. June 2000). One relatively comprehensive set of guideposts for business users is the product of the CPR Commission on the Future of Arbitration. See generally COMMERCIAL ARBITRATION AT ITS BEST, supra note 14. Even this extensive guide, however, does not approach process questions from the standpoint of various specific user goals. A more recent CPR publication does, however, address many key drafting issues. CPR INSTITUTE FOR DISPUTE RESOLUTION, CPR DRAFTER'S DESKBOOK (Kathleen Scanlon ed., 2002).

50 The AAA has offered a multi-tiered approach in its basic rules for a number of years. See, e.g., AAA's COMMERCIAL ARBITRATION RULES (Amended and Effective September 1, 2007) and AAA'S CONSTRUCTION INDUSTRY ARBITRATION RULES (Amended and Effective October 1, 2009). See generally Thomas J. Stipanowich, At the Cutting Edge: Conflict Avoidance and Resolution in the Construction Industry in ADR & THE LAW 65-86 (1997) (describing rationale for American Arbitration Association's tiered construction procedures).
users of arbitration. For example, there has been a trend among leading U.S. arbitration institutions to create discrete templates for expedited or streamlined arbitration.\(^{51}\) In light of growing concerns about the scope and cost of arbitration-related discovery, moreover, various institutions have devoted attention to that subject, and choices may now be discerned among existing procedures.\(^{52}\) These are important steps toward the goal of moving beyond a "one-size-fits-all" approach to arbitration, but much more can be done both from the standpoint of developing alternatives and providing business users with user-friendly roadmaps.

Moreover, providers are ideally positioned to collect and share information about the experience of users with streamlined procedures or other economy- and efficiency-focused devices. Such information is likely to be of critical importance to business clients and counsel as they consider the relative value and appropriateness of different process choices.

Perhaps most importantly, the community of users continues to seek more and better information about the capabilities and skills of arbitrators; this is a significant business opportunity for providers that are able to figure out how to obtain, mine and transmit reliable and relevant data.

**D. The Role of Outside Counsel**

Legal advocates have considerable control over the arbitration experience, including cost and cycle time. Effective advocates, with the cooperation of opposing counsel and the arbitrator, may overcome the deficiencies of arbitration provisions embodying inadequate procedures. Ineffective advocates, on the other hand, may undermine the best-crafted procedural framework. Not surprisingly, National Summit participants believed that outside counsel could do a great deal more to help meet clients' expectations of speed, efficiency and economy in arbitration:

*When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can outside counsel (advocates in arbitration) do to help fulfill those expectations?*

\[^{51}\text{See Stipanowich, Arbitration and Choice, supra note 3, Part III.B.}\]

\[^{52}\text{See id., Part III.C.}\]
Thoughtful, experienced lawyers who understand arbitration and appreciate the significant differences between arbitration and litigation are in the best position to navigate through the arbitration process in a way that most effectively promotes client goals such as economy and efficiency. At each stage of the process—communicating with administrators, selecting arbitrators, providing arbitrators with guidance for the creation of effective procedural orders and establishing a timetable, setting and participating in hearings, and creating a roadmap for the final award—they have opportunities to further these goals. Some advocates may find it possible to collaborate with opposing counsel in order to develop integrative process solutions that promote expedition and economy along with other mutual benefits.53

More attention needs to be given to specific ways advocates can most effectively move the arbitration process along and reduce costs. Advocates, like arbitrators and business users, must also be alerted to the scenarios in discovery, motion practice and hearings that can drive up costs without proportionate benefits.

E. The Role of Arbitrators

Most National Summit participants agreed that arbitrators, too, must share responsibility for meeting user expectations regarding speed, efficiency and economy:

When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can arbitrators do to help fulfill those expectations?

![Graph showing responses to the question](image)

The critical role of arbitrators in achieving efficiency and cost-saving—and in striking an appropriate balance between efficiency and fairness—is well understood by many experienced arbitrators.54 That role also helped inspire recent published guidebooks55 and prompted

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leading arbitration provider institutions to develop more rigorous education and training programs for arbitrators. Such guidance, however, does not normally single out approaches that promote economy and speed, but addresses a variety of purposes. Arbitrators need to understand parties' priorities and act accordingly, but in the absence of clear evidence to the contrary arbitrators should assume that their role is to move proceedings forward as quickly and efficiently as possible, consistent with fundamental fairness.56

As noted above, more emphasis needs to be placed on specific ways of promoting fairness and on spotting and avoiding circumstances that enhance costs and delays without proportionate benefits. Special attention should be given to care in setting timetables and managing discovery, motion practice and hearings.

**F. The Central Lesson**

To summarize, the dramatic "success" of arbitration in evolving into a primary role in the resolution of commercial disputes has brought with it complaints that arbitration has become too much like litigation: too slow, and too costly. While much has been done to improve the understanding of business users and the performance of arbitration provider institutions, advocates and arbitrators, there is a need to focus on the specific ways all stakeholders—beginning with business clients and in-house counsel—can more effectively reduce the cost and length of arbitration. This is the purpose of the *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, presented below with accompanying commentary.

56 See, e.g., McIlwrath & Schroeder, supra note 35, at 6 (discussing priorities of corporate counsel).
IV
Protocols for Expeditious, Cost-Effective Commercial Arbitration

General Principles

These Protocols are premised on the National Summit consensus that the pace and costs of commercial arbitrations are driven by dependent variables: specific steps taken, or not taken, by each of the four constituencies of the arbitration process (i.e., the parties, the advocates, the arbitrators and the arbitration providers). The Protocols are, accordingly, structured to provide specific steps that each constituency can take to alter the current trajectory of increasing costs and extended proceedings in arbitration. For example, if the arbitration provider whose rules control a case provides no option for limited discovery and if the parties and their counsel are battling every issue, the arbitrator’s ability to contain discovery costs is seriously constricted. These Protocols therefore also contemplate that, in adopting specific steps, the constituencies will strive to cooperate and coordinate their actions, yielding maximum impact. Common to the Protocols for each constituency are these overarching principles:

Be deliberate and proactive. Promoting economy and efficiency in arbitration depends first and foremost on deliberate, aggressive action by stakeholders, starting with choices made by businesses and counsel at the time of contract planning and negotiation and continuing throughout the arbitration process. Service providers must actively support good choices in a variety of ways, including publishing and promoting clear procedural choices and putting forward effective arbitrators. Arbitrators must aggressively manage the process from day one of their appointment. All these activities may be strongly reinforced by the cooperative efforts of counsel.

Control discovery. Discovery is the chief culprit of current complaints about arbitration morphing into litigation. Arbitration providers should offer meaningful alternative discovery routes that the parties might take; the parties and their counsel should strive to reach pre-dispute agreement with their adversary on the acceptable scope of discovery, and arbitrators should exercise the full range of their power to implement a discovery plan. The Protocols do not assume that the parties in every case will favor truncated discovery; some disputes require deeper discovery to allow for more efficient hearings. The pivotal point is that, by having options to consider and then by electing an appropriate option for the particular dispute, the overall costs of arbitration can still be contained, if only because disputes over the scope of discovery can be averted by agreements and a scheduling order at the outset.

Control motion practice. Substantive motions can be the enemy or the friend of the effort to achieve lower costs and greater efficiencies. Some see current motion practice as adding another layer of court-like procedures, resulting in heavy costs and delay. Others see current motion practice as missing an opportunity for reducing costs and delay, where clear legal issues that might be disposed of at the outset are instead deferred by arbitrators, to allow parties to conduct discovery and then offer their proofs. Recognizing whether in a particular
case a substantive motion would advance the goal of lower cost and greater efficiency is among the most challenging tasks these Protocols present to the constituencies; they aim to promote cooperation and close consideration of the role a motion might play.

Control the schedule. Since work expands to fill the time allowed, it is critical to place presumptive time limits on activities in arbitration or on the overall process, coupled with “fail safe” provisions that ensure the process moves forward in the face of inaction by a party. At hearings, for example, the use of a “chess clock” approach is of proven value in expediting examinations and presentations. Some experienced in-house counsel favor establishing overall time limits in large, complex disputes as well as smaller cases.

Use the Protocols as tools, not a straitjacket. While there are certain categories of cases that are alike except for the identity of the parties and other participants, most commercial arbitrations with a substantial amount at stake are distinct in at least some way, be it the twist of circumstance that sparked a dispute or the array of legal issues presented. These Protocols offer actions that might apply to the broad range of cases, and yet embedded in them is recognition that parties’ needs vary with circumstances and that a well-run arbitration will at some level be custom-tailored for the particular case. The parties and their counsel are encouraged to embrace those elements of the Protocols that are most appropriate to their circumstances as understood at contract time or after disputes have arisen.

Remember that arbitration is a consensual process. Arbitration is rooted most often in an arbitration agreement made when the parties were in a constructive, business-enhancing mode. When a dispute arises, the reaction will vary. Some parties, looking to do business again in the future or accepting of the occurrence of a dispute, will be able to cooperate productively towards a common goal of cost containment. Other parties, by the point of a dispute, are entrenched in their respective perspectives of what occurred and why the other side is to blame; parties in this mind-set face a daunting challenge to look beyond grievances in order to find cost savings that might benefit each side. These Protocols aim to meet the diverse settings in which cases arise, recognizing that the prescribed behavior ultimately cannot be imposed but can only be encouraged, in a context where the constituencies’ efforts permit formulation of the best plan for the particular case.
A Protocol for Business Users and In-House Counsel

While not all business users seek economy and efficiency in arbitration, these are priorities for most businesses much or most of the time. The high cost and/or length of commercial arbitration appear to be the greatest sources of dissatisfaction with the process. There are, however, a number of choices available to business users—in preparing to sign a contract, after disputes arise, and throughout the arbitration process—that will promote cost- and time-saving in dispute resolution. The following Actions are recommended as options for business users and in-house counsel in making choices regarding arbitration. They may be embraced wholly or selectively in light of business priorities in particular relationships and kinds of disputes.

1. **Use arbitration in a way that best serves economy, efficiency and other business priorities. Be deliberate about choosing between "one-size-fits-all" arbitration procedures with lots of "wiggle room" and more streamlined or bounded procedures.**

Promoting economy and efficiency in arbitration depends first and foremost on proper contract planning. Reflexively "plugging in" a standard form arbitration provision forfeits the single best opportunity business users have for tailoring procedures to limit the scope of discovery, establish timetables and create other boundaries for arbitration. Traditional "one-size-fits-all" provisions afford considerable leeway for arbitrator discretion but also create opportunities for counsel to expand, often excessively, the dimensions and density of the arbitration. The potential benefits of this flexibility must be balanced against significant downsides—the possibility of strategic or tactical manipulation by counsel, and the tendency to convert arbitration into a replica of litigation.

In most cases an arbitration clause should be part of a comprehensive dispute resolution process that might include executive negotiation, mediation and, finally, arbitration. An effective dispute resolution provision incorporating appropriate procedures of a well-established "provider institution" is usually of mutual beneficial to the parties (see Protocol for Arbitration Providers).

Comments:

Those charged with choosing business dispute resolution provisions must take a much more considerate approach to the selection of arbitration procedures—preferably after discussing key goals with the affected executives. If customized provisions seem appropriate, special caution is required in the crafting. Choice regarding arbitration is too important to be left until the eleventh hour of negotiation; process options should be considered and developed

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57 One famous nightmare scenario of one-off drafting which generated nine years of litigation involved a contractual provision for expanded judicial review of arbitration awards. See Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987, 1000 (9th Cir. 2003) overruling LaPine Technology Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997).
ahead of time. By today's standards, simply ticking off basic options ("mediation," "arbitration") and throwing in convenient boilerplate clauses without reflection might be characterized as malpractice; lawyer-counselors must have or gain access to the knowledge and sophisticated tools necessary to address key process choices and issues.

A number of companies have embraced systematic approaches to handling conflict. They have articulated business goals to be achieved in their program, developed effective mechanisms for the early assessment and affirmative management of conflict, and promoted various appropriate dispute resolution tools (including executive negotiation, mediation and arbitration). Approached in this way, as part of a thoughtful and multi-faceted approach to resolving conflict, arbitration is more likely to prove its particular value as a response to business needs and priorities. Binding arbitration is often a favorable alternative to the litigation process, but it is ill-suited to being the sole process option for serving the day-to-day needs of businesses. Rather, the first step should normally be negotiation, followed in most instances by mediation. Keep in mind that mediation not only offers significant opportunities for effective resolution of claims and controversies but may also reap dividends for commercial relationships. Moreover, even if mediators are unable to help the parties reach a complete settlement of substantive issues, they may be in a position to facilitate the tailoring of arbitration procedures most appropriate to the resolution of those same issues.

If a business client places high priority on speed, efficiency and economy in its arbitrations, consideration should be given to adopting (or carefully adapting) arbitration procedures that effectively address those concerns through one or more of the following, discussed at greater length below:

- mandatory pre-arbitration negotiation and/or mediation;
- early "fleshing out" of claims and defenses;
- early identification by arbitrators of legal or factual issues amenable to early disposition that will narrow or focus the issues in dispute, and procedures to resolve those issues;
- meaningful limits on the scope of discovery;
- expedited procedures for resolving motions and discovery disputes;
- overall time limits on arbitration;


Id.

By way of comparison, the Final Report on Litigation Reform calls on courts to "raise the possibility of mediation or other forms of alternative dispute resolution early in appropriate cases." INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (Mar. 11, 2009) [hereinafter Final Report on Litigation Reform].

See generally COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS Ch. 1, 2 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST] (discussing general strategies for conflict management and drafting considerations).
• "fast-track" procedures for appropriate cases;
• relying on one rather than multiple arbitrators when appropriate.

2. Limit discovery to what is essential; do not simply replicate court discovery.

Since the most critical factor in the cost and length of litigation or arbitration is nearly always the scope of discovery, parties seeking efficiency and economy in arbitration must make it clear that discovery in arbitration is not for the litigator who will leave no stone unturned.62

The first and by far the best opportunity for business users to place meaningful limits on discovery is in the arbitration agreement or incorporated arbitration procedures. There are a number of ways in which arbitration provider institutions' procedures might limit discovery (see Protocol for Arbitration Providers, Action 3). A pre-dispute agreement, while not always achievable, is more likely to produce favorable results since post-dispute it is much more difficult to achieve consensus.

A second opportunity occurs when a dispute arises and outside counsel is retained. At this point, in-house counsel may promote discovery limits by acknowledging that, while scaling back on discovery carries some risk that some significant evidence may not be found, the client is prepared to accept that risk in order to secure the greater benefit of a process that is substantially faster and less expensive than litigation. Inside and outside counsel should thoroughly discuss the cost versus benefit of various courses of discovery that might be pursued in the arbitration and memorialize in writing the client's decision concerning the nature and extent of discovery it wishes to initiate (see Protocol for Outside Counsel, Actions 2, 5).

If business users have failed or been unable to avail themselves of either of the first two opportunities, it may still be possible to convince the arbitrator(s) to limit the scope of discovery (see Protocol for Outside Counsel, Action 3; Protocol for Arbitrators, Action 6).

Comments

With regard to options for meaningfully limiting the scope and nature of discovery, see the extensive commentary under the Protocol for Arbitration Providers, Action 3.

3. Set specific time limits on arbitration and make sure they are enforced.

Business users should consider agreeing to binding limits on the length of the arbitration in the arbitration agreement. This could be accomplished by simply setting a deadline (e.g., one year) for completion of the arbitration or by incorporating provider rules that establish a

timetable for each phase of the arbitration. A pre-dispute arbitration agreement might establish different deadlines or timetables corresponding to different total amounts in controversy (see Protocol for Arbitration Providers, Action 4). Arbitrators could be afforded authority to establish procedures and timelines for achieving the contractual limits as well as discretion to vary the limits in truly exceptional circumstances.

Some experienced in-house counsel favor prescribing overall time limits in large, complex disputes as well as smaller cases. If binding time limits are not desired in all cases, however, business users should at least consider their application in disputes involving amounts below a certain dollar figure.

Contractual time limits, like other stipulated boundaries, are only effective if they are recognized and enforced. Thus, it is critical for outside counsel to advocate such enforcement and for arbitrators to respond accordingly (see Protocol for Outside Counsel, Action 3; Protocol for Arbitrators, Action 3).

If businesses are unwilling or unable to establish pre-dispute timetables for arbitration but still hope to set an acceptable deadline, it will be necessary to seek a post-dispute agreement with the other party (if consensus is realistically achievable) or an appropriate arbitral order.

Comments:

C. Northcote Parkinson's famous "law" that work expands to fill the time available for its completion\(^{63}\) encapsulates the fundamental truth that human beings find it nearly impossible to terminate working on an important matter when there is still time left to do more. This is especially true in commercial arbitration where the stakes are often high, those doing the work are typically conscientious "Type A" lawyers, and all actors – both counsel and arbitrators – are being paid by the hour. However, if work on the matter is firmly limited to a fixed period of time, lawyers are very good at determining how to use that time most effectively by concentrating on the most important tasks and dispensing with activities that offer less promise.

Time limits are accepted norms in many critical aspects of modern life, whether it be delivering a Supreme Court argument, or preparing a multi-billion dollar case for trial in certain state and federal courts, or taking a college entrance exam. There is no reason why time limits cannot be placed on completing a commercial arbitration, and many thoughtful observers believe that such limits are the single most effective device available for reining in arbitration cost and delay. Moreover, time limits in arbitration, particularly where arbitrators have authority to increase the limit in exceptional circumstances, are eminently achievable. One senior attorney, who manages a large portfolio of highly complex arbitrations for one of the world's largest corporations, reported at the National Summit that her company has never had a dispute that could not be fairly and efficiently arbitrated within one year.

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The best way to impose time limits on arbitration is to include those limits in the arbitration clause or incorporate provider rules that contain such limits. All expedited or streamlined rules are distinguished by fixed or presumptive time limits, although these vary considerably in detail. The AAA Expedited Procedures, aimed at small-dollar claims, contemplate the shortest cycle time, with an anticipated time horizon of around sixty days.\(^{64}\) CPR's procedures embody a conceptual hundred-day time frame, including a maximum of sixty days to the hearing, thirty days for hearings, and ten days for deliberation and preparation of an award.\(^{65}\) Importantly, the 100-day period does not begin until the date set by the arbitrators at an initial pre-hearing conference; it thus does not include critical early procedures including the selection of arbitrators and detailed statements submitted by both parties.\(^{66}\) JAMS' models also include shortened procedural stages.\(^{67}\)

An agreement to time limits, standing alone, is obviously insufficient; drafters must incorporate specific process elements that facilitate a shorter arbitration. These include faster arbitrator selection procedures, early sharing of detailed information, tightly bounded discovery, and (possibly) limitations on the length of the final award.

Importantly, one Summit participant, a senior in-house dispute resolution lawyer at a leading global corporation, urges business users to use time limits in cases of all sizes:

> [E]xpedited [arbitration] rules are often limited to very small dollar values. I am urging my lawyers to break that paradigm. . . . We are not talking about setting the bar at a couple of hundred thousand, [but rather cases involving] $50 million or less in six months, more than $50 million, 12 months.\(^{68}\)

Once set, timetables should be adhered to in the absence of extraordinary circumstances. One experienced advocate and arbitrator explains:

> Binding limits on the length of proceedings can and should be [utilized]. Often, however, . . . the parties mutually agree they will take the time limits off and [the arbitration] goes on forever.\(^{69}\)

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\(^{64}\) The hearing is "to be scheduled to take place within 30 days of confirmation of the arbitrator's appointment." AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, SECTION E: EXPEDITED PROCEDURES (2009) [hereinafter AAA EXPEDITED PROCEDURES], E-7. Awards are to be rendered within 14 days of the close of hearing. \(\textit{Id.}\), E-9. In the absence of a showing of good cause, the hearing itself is limited to a day. \(\textit{Id.}\), E-8(a). Cf. CONSTRUCTION INDUSTRY ARBITRATION RULES AND MEDIATION PROCEDURES F-9 (2009) [hereinafter AAA CONSTRUCTION INDUSTRY FAST TRACK RULES].

\(^{65}\) INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, EXPEDITED ARBITRATION OF CONSTRUCTION DISPUTES R. 1.3 (2006) [hereinafter CPR EXPEDITED ARBITRATION].

\(^{66}\) \textit{See id.}, Rules 3, 5, 9.3.

\(^{67}\) \textit{See JAMS STREAMLINED ARBITRATION RULES & PROCEDURES} (2009) [hereinafter JAMS STREAMLINED RULES].

\(^{68}\) Michelle Leatham, Esq., Bechtel Corporation, Rossdale Group ADR Teleconference (May 5, 2010).

\(^{69}\) Larry Harris, Esq., Partner, Greenberg Traurig, Washington, D.C., Rossdale Group ADR Teleconference (May 5, 2010).
4. Use "fast-track arbitration" in appropriate cases.

Businesses should use, in appropriate cases, fast-track (expedited or streamlined) arbitration. Businesses wishing to employ fast-track procedures in a pre-dispute arbitration agreement must either specify those procedures and the circumstances under which they will be used or incorporate an arbitration provider's rules that detail such procedures and the circumstances of their application.

Some businesses may be willing to utilize, in cases of certain types or certain dollar amounts, a highly truncated approach in which discovery and motions are not permitted; the parties' arbitration demand and response are accompanied by detailed statements of their claims and/or defenses as well as all facts to be proven, supplemented by citation to all legal authorities relied upon, copies of exhibits, and summaries of the testimony of all lay and expert witnesses, after which the case proceeds to an immediate hearing (see Protocol for Arbitration Providers, Action 5).

Comments:

See comments under Action 3 above.

5. Stay actively involved throughout the dispute resolution process to pursue speed and cost-control as well as other client objectives.

Sophisticated in-house counsel know that it is absolutely essential for business principals and senior in-house counsel to stay actively involved throughout the dispute resolution process. They should conduct an early case assessment to determine how much of an effect the dispute may have on the business's important interests, the prospects for a successful outcome, how much time and money the business is prepared to devote to the resolution of the dispute, and what resolution approach is likely to be most effective. If outside counsel is not involved in early case assessment, in-house counsel should convey the internal assessment to outside counsel and request their independent analysis (see Protocol for Outside Counsel, Action 2). As they do with other large expenditures, businesses should set an appropriate and realistic budget for arbitration and should forbid outside counsel from exceeding that budget without express approval. In-house counsel should attend the first case management conference as well as all important subsequent conferences and hearings during the arbitration process in person or by telephone, should require periodic status reports from outside counsel, and should actively partner in the management of the arbitration rather than relinquishing such control to outside counsel.

Comments:

In-house counsel must play an important part in forward planning and continuous management of the arbitration schedule; minimization of interruptions through firm stances supported by flexible solutions such as consensus; and preparing their companies to deal
appropriately with changing circumstances. Communication must be healthy not only with traditional stakeholders but with “the key business person(s) who will often have the best handle on the value to the business of the disputed matter, including its risks. They will discuss frankly the expense, delay, and lost opportunity cost of proceeding in the most litigation-like manner in arbitration, especially discovery and motion costs, scheduling the evidentiary hearing (how soon and how lengthy), and hearing procedures. In arbitration the parties can and should decide how much process they want, and want to pay for.”

In-house counsel are a vital part of the effort to distinguish the tone of an arbitration process from that of litigation. This is noted with particular frequency by some commentators in the area of labor disputes, who advocate approaching arbitrations in terms of bottom line savings over the long term. An efficient arbitration process may have a significant impact on relationships with current and past commercial partners.

6. Select outside counsel for arbitration expertise and commitment to business goals.

In-house counsel should select outside arbitration counsel for their expertise in arbitration, not litigation, their likely effectiveness as advocates in the arbitration process, taking account of the key players (opposing party and counsel, the arbitration provider institution, and prospective or appointed arbitrators), and their ability to meet client’s objectives regarding speed and economy (including the client’s decision regarding the extent of resources to be devoted to the matter). In-house counsel should explore the possibility of billing arrangements other than pure hourly billing such as fixed fees, contingency fees, and other arrangements that incentivize counsel to conduct the arbitration and resolve conflict as efficiently and expeditiously as possible (see Protocol for Outside Counsel, Action 7).

Comments:

An international organization recently sponsored a competition among major law firms with the aim of identifying a firm whose practice embodied effective methods of managing and resolving business-related disputes. The entries revealed very different conceptions of what constitutes effective dispute resolution. Some firms simply touted big court victories, while others focused on their expertise in commercial arbitration. Still others portrayed a variegated

70 COMMERCIAL ARBITRATION AT ITS BEST, supra note 61, at 226.


72 “The Dispute-Wise studies found that the most dispute-savvy businesses considered the full spectrum of legal disputes as a portfolio — where the focus was not on ‘winning’ each individual dispute through protracted litigation but on ‘winning’ back the loyalty of Stakeholders who will stay with you for the long haul if you treat them with fair-mindedness and integrity when disputes inevitably occur.” THE METROPOLITAN CORPORATE COUNSEL, EXPERTS IDENTIFY ADR TRENDS AND BEST PRACTICES (January 1, 2006), available at http://www.metrocorpcounsel.com /current.php?artType=view&EntryNo=4160.

73 These comments are drawn in large measure from Stipanowich, Arbitration and Choice, supra note 58.
practice employing different approaches, including early case assessment, negotiation, mediation, arbitration and litigation to address particular client needs.

Business clients typically rely heavily on outside counsel to represent their interests in the management of conflict, including arbitration. These advocates have as much to do with realization of a client's goals and expectations as procedures, administrative framework or neutrals. The wide variation in approaches to conflict makes it inevitable that some law firms—and lawyers—will be more suitable for particular clients—and particular circumstances—than others. Selection of a law firm or lawyer that lacks the willingness or capability to align itself with the client's goals may undermine the most careful contract planning.

Unless a legal dispute is inevitably destined for the courtroom, something beyond litigation experience is essential in outside counsel. Litigation experience is not in itself sufficient to qualify one as arbitration counsel—the legal and practical differences are simply too great. Moreover, as our discussion of varied client goals reveals, arbitration and court trial are very often appropriately relegated to a secondary or tertiary role, forming a backdrop or backstop for efforts at informal dispute resolution. With that in mind, an effort should be made to ensure that counsel is capable of understanding and fulfilling a client's specific goals and priorities in addressing disputes. Consider the following list of questions that might be asked before retaining counsel to resolve a dispute:

- Do you have experience helping clients consider the appropriateness of options for early resolution of disputes? What options do you discuss?
- What methods do you use to analyze options?
- What is your experience with and attitude toward negotiated resolution of disputes? With mediated negotiation?
- Have you had formal training in negotiation or mediation theory and practice?
- What is your experience with commercial arbitration, including arbitration under the relevant procedures and administrative framework? Are you familiar with the case managers or case administrators for this matter?
- Are you familiar with the provider institution's list of arbitrators?
- Are you familiar with applicable ethics rules?
- What experience have you had negotiating, arbitrating or litigating with opposing counsel? What is the nature of your relationship?
- How does your arbitration advocacy differ from your advocacy in litigation?
- What techniques have you found to be most effective in promoting efficiency and economy in commercial arbitration?
- What professional service models do you employ other than hourly fees? Are you willing to explore incentives for early resolution?

As noted above, even after vouchsafing the role of advocate to appropriate outside counsel, a prudent client or inside counsel will continue to be involved in the conflict resolution

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74 COMMERCIAL ARBITRATION AT ITS BEST, supra note 61, at 5-6, 10-33, 39-41.

75 Depending on the circumstances, this might include an exploration of experience with expedited rules, rules for large or complex arbitration, or appellate arbitration rules.
process. This means being present at key decision points before and during arbitration, including pre-hearing conferences at which the timetable and format for the arbitration are discussed and established.\(^76\)

7. **Select arbitrators with strong case management skills.**

In-house counsel should be actively involved, alongside outside counsel, in selecting arbitrators who are able and willing to promote effective cost- and time-saving procedures. Information from provider institutions may be supplemented by intra-firm communications and discrete queries to listservs and social networking programs. Counsel might agree to pre-screen prospective arbitrators by means of a questionnaire or joint or separate interviews; counsel should be forthright in asking prospective arbitrators about their philosophy and style of case management (see Protocol for Outside Counsel, Action 3).

Counsel should be aware that (1) the requirement that its arbitrators continually upgrade their process management skills and (2) the quality and scope of information regarding prospective arbitrators, may offer key points of comparison among arbitration provider institutions (see Protocol for Arbitration Providers, Points 7, 10).

Comments:\(^77\)

It has been said that "the arbitrator is the process." This is not mere hyperbole: while the appropriate institutional and procedural frameworks are often critical to crafting better solutions for business parties in arbitration, the selection of an appropriate arbitrator or arbitration tribunal is nearly always the single most important choice confronting parties in arbitration;\(^78\) a misstep in the choice of arbitrator(s) may undermine many other good choices.

One should never choose an arbitral institution without doing due diligence regarding the institution's panel or list of neutrals and ascertaining whether or not the requisite experience, abilities and skills are represented. In order to inform and channel the eventual selection process, moreover, it may be appropriate to prepare reasonable guidelines for the choice of neutral(s) for particular kinds of disputes. In considering candidates, some or all of the following may be relevant: legal, professional, commercial or technical background; notability;\(^79\) hearing management experience and skills; attitudes about arbitration; current schedule and availability.

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\(^{76}\) See COMMERCIAL ARBITRATION AT ITS BEST, supra note 61, at 183-190.

\(^{77}\) These comments are drawn in large measure from Stipanowich, Arbitration and Choice, supra note 58, 432-434.

\(^{78}\) JAY FOLBERG ET AL., RESOLVING DISPUTES—THEORY, PRACTICE & LAW 470-73 (2008) ("the choice of arbitrators [is] critical for two reasons: They will likely provide the only review of the case's merits, and arbitrators will have primary control over the process itself.").

\(^{79}\) Notability in the sense of perceived standing within a commercial community or industry, while insufficient in itself, may be especially desirable if an authoritative pronouncement or application of pertinent norms and practices is needed. Int'l Produce, Inc. v. A/S Rosshaveit, 638 F.2d 548, 551-52 (2nd Cir. 1981) ("The most sought-after arbitrators are those who are prominent and experienced members of the specific business community in
Again, the relevant questions depend on goals and priorities. If those priorities include low cost, efficiencies, and the avoidance of undue delay, the following queries may be helpful:

- Should a single arbitrator be sufficient for selected classes or kinds of disputes?  
- Does the prospective arbitrator (or chair of the arbitration tribunal) have experience in process management, and does that experience reflect well on his or her ability to supervise an efficient, economical process?  
- Is the prospective arbitrator committed to the concept of promoting economies and efficiencies throughout the process?  
- Is the prospect available for expedited hearings, or for hearings over the period during which the arbitration is likely to occur? What other standing or prospective commitments does the arbitrator have?

It is reasonable for parties to expect arbitrators to give them what they bargained for. While arbitrators should always seek appropriate ways of promoting efficiency and economy in the absence of contrary agreement, clear contractual language emphasizing the primacy of such expectations should give rise to special effort on their part. Business users and counsel should emphasize to the arbitrator their expectations about arbitrator techniques like the following:

- Emphasizing speed and cost-saving to the parties at the outset, particularly the firmness of the schedule and granting continuances only for good cause;
- Functioning as role models (cooperating with other arbitrators, including party-arbitrators; avoiding scheduling conflicts wherever possible);
- Actively managing the process, beginning with a pre-hearing conference resulting in an initial procedural order and timetable for the entire arbitration;
- Simplifying arrangements for communication, including the elimination of unnecessary communications through case administrators or third parties;
- Simplifying, clarifying, and prioritizing issues,

which the dispute to be arbitrated arose.\(^8\);}  


\(^81\) See John Tackaberry, Flexing the Knotted Oak: English Arbitration’s Task and Opportunity in the First Decade of the New Century, Society of Construction Law Papers 3 (May 2002).


\(^83\) COMMERCIAL ARBITRATION AT ITS BEST, supra note 61, at 6-8.


\(^85\) Id., Ch. 6 § V(L).

\(^86\) Id., §§ V(B)-(D), (I); Ch. 7 §§ III(B)-(C), (E)-(L).
• Addressing jurisdictional issues and reasonable requests for interim relief as soon as practicable; 87
• Facilitating and actively monitoring information exchange/discovery; 88
• Employing electronic means of communication and document management as appropriate; 89
• Scheduling hearings with as few interruptions as possible; 90
• Planning and actively managing the hearings (ending each hearing day with housekeeping sessions); 91
• Anticipating potential problems (such as the unavailability of witnesses, unanticipated circumstances) and seeking creative solutions to minimize delay. 92

8. Establish guidelines for early "fleshing out" of issues, claims, defenses, and parameters for arbitration.

Businesses should consider agreeing that before the preliminary conference, parties will provide preliminary statements of legal and factual issues, key facts to be proven, estimated damages broken down by category, and likely witnesses and types of experts (see Protocol for Arbitration Providers, Action 8). They should also consider requesting that, following the first, or at the latest, the second case management conference, the arbitrators issue comprehensive case management orders that incorporate limitations on discovery and motion practice, and set time frames and hearing dates that will not be varied except for good cause shown (see Protocol for Arbitrators, Actions 3, 4).

Comments: 93

One significant insight emerging from the development of streamlined rules is the critical importance of requiring parties to furnish detailed information regarding claims and defenses at the front end of the process. By way of illustration, the JAMS expedited construction model calls for claimants to file a

Submission of Claim . . . including a detailed statement of . . . claim including all material facts to be proved, the legal authority relied upon . . . , copies of all

87 Id., Ch. 2 § III; Ch. 6 §§ III(C), V(D); Ch. 7 § III(B), (D).
88 Id., Ch. 8.
89 Id., Ch. 6 §§ II(D), IV, V(L).
90 Id., Ch. 9(VI).
91 Id., Ch. 9 passim.
92 Id., §§V, VI(A)-(D), VII(C)-(D), IX(A), (F).
93 These comments are drawn in large measure from Stipanowich, Arbitration and Choice, supra note 73, 410-411.
documents that Claimant intends to reply upon in the arbitration and names of all witnesses and experts Claimant intends to present at the Hearing.94

Respondents are then required to prepare a Submission of Response of similar substance and form within twenty days of service of the Submission.95 These requirements represent a dramatic departure from the current norm in arbitration practice and demand significant adjustment in the expectations of advocates. They can be, however, a critical element of an efficient process, as recognized by the new Final Report on Litigation Reform, which concludes that the failure to effectively identify issues early-on "often leads to a lack of focus in discovery."96

Of course, the onus of these rules is likely to fall disproportionately on respondents, since claimants will have the opportunity to make preparations in advance of making an initial demand. For this reason, current procedures emphasize arbitrator discretion to give respondents reasonable time extensions.97 Where arbitration is preceded by negotiation or mediation, moreover, both parties will be on notice of the likelihood that claims will be brought to arbitration.

Recently, some business users have expressed concerns about the cost of “front-loading” preparation costs by requiring extensive disclosure at the outset. These concerns may be at least partially addressed by a simpler approach to “putting flesh on the bones” at the beginning of the arbitration, such as having the parties submit informal memoranda or letters describing the background of the disputes and the factual and legal issues.

In expedited processes the pre-hearing conference assumes special significance as a tool for process planning and guidance.98 Arbitrators may also find it necessary or appropriate to conduct frequent telephonic status meetings to ensure that progress is being made toward meeting deadlines.

94 JAMS Streamlined Arbitration Rules & Procedures R. 7 (2009) [hereinafter JAMS Streamlined Rules]. See also International Institute for Conflict Prevention & Resolution Expedited Arbitration of Constr. Disputes R. 3 (2006) [hereinafter CPR Expedited Arbitration] ("Statement of Claim" is to include a detailed statement of all facts to be proved, legal authorities relied upon, copies of all documents Claimant intends to rely on, and names, CV and summary opinion testimonies of expert witnesses Claimant intends to present.").

95 See CPR Expedited Arbitration, supra note 94.

96 Final Report on Litigation Reform, supra note 60. The Report calls for notice pleading "to be replaced by fact-based pleading . . . that "set[s] forth with particularity all the material facts that are known to the pleading party to establish the pleading party’s claims or affirmative defenses." Id. at 5.

97 See, e.g., CPR Expedited Arbitration, supra note 94, Rule 3.6 (permitting the Tribunal to extend the time for the Respondent to deliver its Statement of Defense); id. at Rule 11(e)(permitting Arbitrator to extend deadlines).

98 See id. at Rule 9. A pre-hearing conference held before the arbitration hearing may be necessary to deal with difficult preliminary issues, such as specifying issues to be resolved or stipulating uncontested facts. Joseph L. Daly, Arbitration: The Basics, 5 J. AM. ARB. 1, 40 (2006); Commercial Arbitration at Its Best, supra note 61, at 176-78.

Businesses should also consider agreeing to procedures for limiting "reflexive" motion practice and expediting the presentation and hearing of motions that have the potential to promote cost- and time-saving in arbitration (see Protocol for Arbitration Providers, Action 6).

Comments.99

As stated in Part II, the use of dispositive motions in arbitration is a double-edged sword.100 This import from the court system, prudently employed, is a potentially valuable tool for narrowing arbitral issues prior to hearings and full-blown discovery, thus avoiding unnecessary preparation and hearing time.

The problem is that, as in court, motion practice often contributes significantly to arbitration cost and cycle time without clear benefits. The filing of motions often leads to the establishment of schedules for briefing and argument that entail considerable effort by advocates, only to have the arbitrators postpone a decision until the close of hearings.101 As two GE counsel lamented:

Any business lawyer knows that even the most complex disputes usually boil down to one or two critical issues that, once decided, will either determine the lion's share of the dispute or encourage parties to settle. And yet, the experience of many companies . . . is that tribunals in international commercial arbitrations, whether out of concern for due process or other reasons, are rarely willing to grant such relief in the early stages of a proceeding when doing so would have the greatest impact and benefit for the parties.102

While it is generally appropriate for arbitrators to steer clear of dispositive motions involving extensive factual issues, there are certain matters that may be forthrightly addressed early on with little or no discovery or testimony, such as contractual limitations on damages, statutory remedies, or statutes of limitations and other legal limitations on causes of action.103

99 These comments are drawn in large measure from Stipanowich, Arbitration and Choice, supra note 58, 412-413.


103 COMMERCIAL ARBITRATION AT ITS BEST, supra note 61, at 48, 53-55. The new Final Report on Litigation Reform states that "parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution." Final Report on Litigation Reform, supra note 60, at 22. It also calls for "a new summary procedure . . . by which parties can submit applications for the determination of enumerated
If dispositive action is foreseen as a useful element in arbitration, there should be an appropriate provision in the arbitration procedure.\textsuperscript{104}

At the time of appointment, moreover, parties should assess whether potential arbitrators are temperamentally and philosophically capable of rendering dispositive awards. Indeed, some leading arbitrators insist that motions should be addressed directly and energetically, since in many cases a prompt telephonic discussion may avoid the need for extensive briefing.\textsuperscript{105}

\textbf{10. Use a single arbitrator in appropriate circumstances.}

Businesses should consider using a single arbitrator when appropriate. Some in-house counsel believe the costs and practical problems associated with three-member tribunals often outweigh the benefits, and are willing to submit all but the most complex cases to a single arbitrator. Others believe that collegial decision-making usually produces better decisions by decreasing the chance that important points will be overlooked or misunderstood, and that the additional cost of having three arbitrators, which is typically a fairly small part of total arbitration costs, is well worth the expenditure in important cases. Before providing for a three-member tribunal, counsel should always consider whether the complexity of the issues, the stakes involved, or other factors warrant the use of three arbitrators. A strong argument can often be made for sole arbitrators in cases with low or moderate damages exposure. (Depending on the parameters set for the use of a single arbitrator, parties may need to modify the arbitration procedures incorporated in the arbitration agreement to address this issue.)

In cases with three-member panels, businesses should consent to having the chair decide discovery disputes and other procedural matters unless all parties request the involvement of the full tribunal.

\textbf{Comments:}

Using a single arbitrator instead of a panel is an obvious choice for those seeking economy and efficiency; it simplifies every stage of arbitration from appointment to award-writing. Thus, some expedited procedures assume that a single arbitrator will be appointed unless the parties agree otherwise.\textsuperscript{106}

While employing a multi-member tribunal may make some lawyers more sanguine about streamlined arbitration of larger claims, it increases costs and increases the likelihood of

\textsuperscript{104} See, \textit{e.g.}, JAMS \textsc{Comprehensive Arbitration Rules} \& \textsc{Procedures} R. 18 (2007) [hereinafter JAMS \textsc{Comprehensive Rules}].

\textsuperscript{105} See Chang, \textit{supra} note 82, at 16.

\textsuperscript{106} See, \textit{e.g.}, AAA \textsc{Expedited Procedures}, \textit{supra} note 64, E-4; JAMS \textsc{Streamlined Rules}, \textit{supra} note 67, Rule 12(a). \textit{But see} CPR \textsc{Expedited Arbitration}, \textit{supra} note 65, Rule 5.1 (providing for three neutral arbitrators).
delay. If drafters are truly serious about maintaining timelines, they should require each appointee to the tribunal to expressly represent to the parties that he or she has the time available to ensure that the expedited timetable will be achieved.107

11. Specify the form of the award. Do not provide for judicial review for errors of law or fact.

Business users should specify in the arbitration agreement the form of award desired (e.g., bare, reasoned, findings of fact and conclusions of law, etc.) and, where appropriate, a limit on the length of the award, bearing in mind that the more detailed the award, the more costs increase.

Business users should not include in their arbitration clauses an agreement that attempts to authorize courts to review arbitration awards for errors of fact or law. Besides raising issues of enforceability under arbitration law, such provisions may entail significant additional process costs and delays without commensurate benefits. If a business is not content to accept judicial review that is limited to the few grounds for vacatur set forth in the Federal Arbitration Act or comparable state statutes, a course that best achieves the finality which is among the major benefits of arbitration for most business users, it should incorporate in its arbitration clause a well-designed appellate arbitration procedure such as those sponsored by some provider institutions.

Comments:

1. Increased cost and cycle time through questionable choice-making: agreements to expand judicial review

Although increased costs and delays are in large measure a result of business users' failure to plan for arbitration by making appropriate process choices, contract planners may only exacerbate these problems if they make the wrong choices. A contractual provision providing for judicial review and vacatur of arbitration awards for errors of law or fact may well prove to be a "bad choice."

Consistent with the understanding that arbitration offered businesses the opportunity to avoid the "needless contention that [is] incidental to the atmosphere of trials in court,"

108 Congress in the Federal Arbitration Act produced a spare legal framework for the judicial enforcement of arbitration agreements and awards. A keystone of this structure is the rigorously restrained template for judicial confirmation, modification or vacatur of arbitration awards, including a narrow statutory imprimatur for vacating awards (limited in essence to situations where due process was not accorded or where arbitrators clearly acted in excess of their contractually-defined authority109). These stricture imbue arbitration awards with a meaningful—or, depending on one's point of view, an awful—finality. The fear of being

107 See, e.g., CPR EXPEDITED ARBITRATION, supra note 65, Rule 7.2. It makes sense to obtain such a commitment from a sole arbitrator as well.


saddled with a truly bad award gives some business lawyers pause—especially when the potential business consequences are dire. This fear inspired in recent years the emergence of a species of arbitration agreements calling for more searching judicial scrutiny of awards, including review of awards for errors of law or fact. Conceptually, one supposes, the result would be a hybrid in which the benefits of private arbitration would be coupled with the checks and balances of the civil appellate process. But the sword is double-edged and the pitfalls for unwary drafters multiple.

While there has been a lot of emphasis on the legalities of contractually expanded judicial review, considerably less attention has been given a more fundamental question—namely, "Do contract planners do their clients a favor by including such provisions in commercial arbitration agreements?" The one gathering of experts that directly addressed the issue, the CPR Commission on the Future of Arbitration, an aggregation of leading arbitrators and attorneys specializing in arbitration, responded with a resounding "No!" They viewed such provisions as undermining key conventional benefits of arbitration, including finality, efficiency and economy, and expert decision-making. Such provisions would, they believed, increase costs and delay the ultimate resolution of conflict without commensurate countervailing benefits. Moreover, such provisions pose particular challenges for drafters, both from the standpoint of creating practical, workable standards for review and addressing all of the pre- and post-award procedures required to implement enhanced review, including: dollar or subject matter limits on review; the creation of an adequate record; the making of a sufficiently specific, reasoned award; notice requirements; the possibility of remand to the original arbitrator(s); and the handling of related costs.

The extreme downside of contracting for expanded review in an atmosphere of uncertainty regarding the legal propriety and enforceability of such provisions was famously exemplified by the nine-year battle punctuated by two decisions of the Ninth Circuit. In *La Pine Technology Corp. v. Kyocera*, the court concluded that it was obliged to honor the parties' agreement that any arbitration award would be subject to judicial review for errors of fact or law. But after six more years of legal maneuvering before the district court and the original arbitration panel, the Ninth Circuit reconsidered its original decision *en banc* and reversed:

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111 Commercial Arbitration at Its Best, supra note 61, at 291 (summarizing conclusions of CPR Commission).

112 Id.


114 La Pine Tech Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997) (attorneys were able to provide for expanded judicial review in the arbitration clause that they drafted), overruled by Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (2003).
itself, declaring that enforcing expanded review provisions such as those before it would "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."

Compounding the drafter's dilemma is the fact that such provisions have not been uniformly embraced by federal and state courts. The federal circuits split on the question of whether expansion of the FAA grounds for judicial review was permissible; state court decisions also reflect a divergence of authority.

Seeking to resolve the split among federal circuits, the U.S. Supreme Court held in *Hall Street Associates, L.L.C. v. Mattel, Inc.* that the Federal Arbitration Act (FAA) does not permit parties to expand the scope of judicial review of arbitration awards by agreement. Justice Souter's opinion, joined by five other justices, declared that the grounds for judicial review of arbitration awards set forth in §§ 10–11 of the FAA are the exclusive sources of judicial review under that statute. Moreover, the FAA's provisions for confirmation, vacatur and modification should be viewed as "substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." Having strained mightily to nail down the coffin lid on contractually expanded review under the FAA, however, the Court affirmatively invited consideration of other avenues to the same ends, as where parties "contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable." Although it may be some time before the full import of this invitation is clarified, it is likely that state statutes or controlling judicial decisions promoting contractually expanded review will become "safe harbors" for such activity. New Jersey is perhaps the sole example of a statutory template for parties that wish to "opt in" to the legislative framework for elevated scrutiny of awards; in *Cable Connection, Inc. v. DIRECTV, Inc.*, California's highest court recognized a more general "safe harbor" for contractually expanded judicial review under that state's law.

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115 *Kyocera*, 341 F.3d at 998.


117 *id.* at 1403.

118 "Any other reading [would open] the door to full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Id.* *(quoting Kyocera, 341 F.3d at 998).*

119 In a highly unusual move, the Court had requested additional briefing on these issues after the initial arguments; its March decision concluded that the supplemental arguments raised new points which required a remand for the development of the issues. The Ninth Circuit subsequently issued a remand order to the district court, concluding that the High Court decision "preserved the issue of sources of authority, other than the Federal Arbitration Act, through which a court may enforce an arbitration award. . . ." *Hall Street Associates LLC v. Mattel Inc.*, No. 05-35721, 2008 U.S. App. LEXIS 14490 (July 8, 2008).

120 128 S. Ct. at 1406.


122 *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586 (Ca. 2008).
The foregoing survey of the complex legal landscape surrounding contractually expanded judicial review illustrates the risks and uncertainties confronting those who would seek to include such provisions in their arbitration agreements. In some cases contract planners may come to the conclusion that the difficulties of securing judicial oversight of arbitration awards require them to forego arbitration entirely, at least for certain classes of cases.

2. Alternatives to expanded judicial review; appellate arbitration processes

There are other, less radical choices for those concerned about protection from "off the wall" arbitration awards. These include identifying arbitrators who are likely to deliver an authoritative and rational decision, requiring the arbitrators to produce a detailed rationale for their awards, placing limits on awards of monetary damages (including upper and lower limits for the award), a baseball arbitration format requiring arbitrators to make a choice between two alternative monetary awards, and a prohibition on certain kinds of relief, such as punitive damages.\(^\text{123}\) For those who seek a close analogue to judicial review, however, an appellate arbitration procedure may afford the most suitable alternative.

Appellate arbitration procedures afford parties the opportunity of a "second look" at an arbitration award in a controlled setting while avoiding the delays and legal uncertainties associated with expanded judicial review, since properly constituted agreements for "second-tier" arbitration are just as enforceable as any other arbitration agreements, as are resulting awards.\(^\text{124}\) Appellate arbitration procedures have been utilized in a variety of commercial contexts, and at least two major institutions,\(^\text{125}\) the International Institute for Conflict Prevention & Resolution (CPR) and JAMS, have published appellate arbitration rules that may be utilized in commercial cases.\(^\text{126}\)

Crafting an appropriate arbitral appeal process involves consideration of numerous procedural issues, including the qualifications of the appellate arbitrator(s) and method of selection; scope limits on appealable disputes; filing requirements; administrative fees; time limits on filing and appellate procedures; applicable standards of review; the type of record that will be maintained of the original arbitration hearing, and transmitted to the appellate arbitrator(s); the format of the original arbitration award; the form of argument on appeal (written, oral, or both); the remedial authority of the appellate arbitrator(s); the possibility of remand of the award to the original panel or to a different panel; and the handling of costs, including the potential shifting of costs if an appeal is unsuccessful.\(^\text{127}\) Given the transaction

\(^{123}\) See id. at 277-281.

\(^{124}\) See, e.g., Cummings v. Future Nissan, 2005 WL 805173 (Cal. Ct. App. 3\(^{rd}\) Dist Apr. 8, 2005) (affirming lower court order confirming award by appellate arbitrator).

\(^{125}\) See COMMERCIAL ARBITRATION AT ITS BEST, supra note 61, at 299-300.


costs associated with their formulation, fully customized appellate rules are probably feasible only in exceptional cases (such as long-term relationships or large-scale business transactions). In most cases, parties will probably want to rely on existing institutional models.

12. Conduct a post-process "lessons learned" review and make appropriate adjustments.

At the conclusion of the arbitration, in-house counsel should conduct a thorough analysis of lessons learned and should make appropriate adjustments in arbitration policies, agreements, rules and management to address concerns regarding efficiency and economy.

Comments:

Self-evaluation is a fundamental strategy for every successful enterprise. Arbitration should be regarded no differently from other strategic processes. Executives and in-house counsel should review the entire proceeding and consider the financial and strategic impact of each tactical decision. These Protocols offer a road map for some key decision points to consider, while sections like Action 5 above may assist in-house counsel specifically in a frank self-evaluation. Questions that might be asked include these: Did the particular dispute resolution clause in this contract work well for us in this situation? Why or why not? Did the arbitration rules incorporated in that clause work well? Did our initial case assessment turn out to be accurate? If not, how can we improve our assessments in the future? Are we satisfied with the budget and effort level that we set for this case? Did outside counsel stick to the budget and represent us both effectively and efficiently? Was our fee arrangement with outside counsel appropriate? Did the arbitrator(s) conduct the proceeding efficiently? If not, how could it have been better conducted? Overall, was arbitration preferable to litigation in this instance?

Business users should also seek out arbitration providers who support evaluation and feedback processes through their arbitrators and rules (see Protocol for Arbitrations Providers, Actions 10 and 13).
A Protocol for Arbitration Providers

Business users rely heavily on arbitration providers for arbitration procedures, arbitrator selection and administrative services. In order to effectively promote economy and efficiency, providers need to offer users clear-cut process choices and develop and share information on their relative value and effectiveness. They also need to take measures to ensure that parties can find arbitrators with the proper case management skills and philosophy. The following specific Actions should be undertaken by providers for the purpose of achieving these goals.

1. **Offer business users clear options to fit their priorities.**

Instead of promoting a single "one-size-fits-all" set of procedures, institutions that provide dispute resolution services for business disputes should publish and actively promote a variety of templates, including arbitration clauses and procedures to give users real choices that fit their priorities, including time and cost savings. A provider's website should be organized in a manner that facilitates clear and easy access to different process choices, and should offer straightforward guidance (including, if possible, specific user feedback) about the benefits and costs to users of each process choice.

Comments:

Conceptually, between an arbitration model that seeks maximum expedition and economy and a model that incorporates litigation-like procedures while still preserving many of the advantages of arbitration (selection and accessibility of the decision-makers, privacy, finality, etc.) lies a broad spectrum of graduated arbitration models, each allowing a little greater process with a little less economy. To enable commercial arbitration users to choose the balance that is right for them, or even different balances for different kinds of cases, arbitration providers should offer a basic complement of dispute resolution clauses and rule sets that reflect several different points along the spectrum. Each rule set should prescribe procedures and staged timelines that permit completion of the arbitration by specified deadlines.

For example, the most economical ("fast track") model could involve a highly truncated arbitration with no discovery or motions and award issuance within 90 days of commencement (see Protocol for Arbitration Providers, Actions 5 and 8 below). Next could be a streamlined arbitration model that would offer a modicum of discovery (perhaps five document requests and four hours of depositions) but still provide for completion of the arbitration within six months. A standard arbitration model might allow somewhat more discovery and motions practice, though still far less than in litigation, and provide for completion of the arbitration in nine months (see Protocol for Business Users and In-House Counsel, Actions 2, 8, 9, and 11, and Protocol for Arbitration Providers, Actions 3, 4, 6, and 11). Finally, providers should offer a customized model, in which arbitrators would be empowered to develop, after consulting with counsel, customized procedures, perhaps litigation-like in some respects, which would nevertheless permit completion of the arbitration within one year in all but the most exceptional circumstances. Offering the arbitral counterpart of four, progressively fuller fixed-
price menus would truly provide business users with meaningful, easily implemented choices among arbitration models.

User feedback can be valuable in convincing business users and outside counsel of the viability of alternatives to traditional standard procedures. Dependable information about the application of process choices will make business users and outside counsel significantly more likely to "jump in" and take advantage of fresh options. Providers should aggressively solicit and organize feedback about specific options and their effectiveness in meeting users' priorities and standards.

See comments under Protocol for Business Users, Action 1, above. See also Actions 4, 5, 10 and 13 below for discussion of other related issues.

2. **Promote arbitration in the context of a range of process choices, including "stepped" dispute resolution processes.**

Resolving conflict through negotiation or mediation usually affords parties a superior opportunity to avoid significant cost or delay, and offers several other potential benefits, including greater control over outcome, enhanced privacy and confidentiality, preservation or improvement of business relationships, and better communications. Even if it fails to produce settlement, moreover, mediation may also "set the table" for arbitration. Therefore, provider-developed arbitration clauses and procedures should be employed within comprehensive, stepped dispute resolution provisions that begin with executive negotiation and mediation.

Comments:

See Protocol for Business Users, Action 1, above.

Stepped dispute resolution clauses can project a note of flexibility when a commercial agreement is created, while still assuring a binding, arbitrated resolution of any disputes that defy settlement.

One example of arbitration as part of a basic layered dispute resolution process is the following provision for arbitration as a “third layer” process following negotiation (“layer one”) and mediation (“layer two”):

C. **LAYER THREE: THE ARBITRATION STAGE (c) Arbitration.** If the mediation provided for in "b" above does not conclude with an agreement between the Parties resolving the Dispute, the Parties agree to submit the Dispute to binding arbitration under the [insert incorporated commercial arbitration procedures]. If the Parties cannot agree on an arbitrator, the person who served as mediator shall select the person to serve as arbitrator from a list compiled by the Parties or, where the Parties do not compile a list, from a list maintained by a bona fide dispute resolution service provider or private arbitrator. The arbitrator's award shall be final, binding and may be converted to a judgment by a court of competent jurisdiction upon application by either party. The arbitrator's award shall be a written, reasoned opinion (unless the reasoned opinion is waived by
the Parties). The Parties shall have ten (10) days from the termination of the mediation to appoint the arbitrator and shall complete the arbitration hearing within six (6) months from the termination of the mediation. The arbitrator shall have the authority to control and limit discovery sought by either party. The arbitrator shall have the same authority as a court of competent jurisdiction to grant equitable relief, and to issue interim measures of protection, including granting an injunction, upon the written request with notice to the other party and after opposition and opportunity to be heard. The arbitrator shall take into consideration the Parties' intent to limit the cost of and the time it takes to complete dispute resolution processes by agreeing to arbitrate any Dispute.\textsuperscript{128}

An option to consider is that of an "arbitration reset button." Contained in tiered dispute resolution clause, this clause provides that if the parties' dispute is not first resolved through the prerequisite executive negotiation and/or mediation, "then, within ____ days [or immediately] following the executive discussions and/or mediation, the parties shall confer and determine whether they wish to mutually renegotiate the default arbitration provision contained herein."\textsuperscript{129}

A less formal approach to the “reset button” concept may occur in the context of mediation. Where the parties are unable to reach full agreement on substantive issues, it may be possible for an experienced mediator to facilitate a new or modified agreement respecting arbitration procedures. A mediator can play an invaluable role in escorting parties into a structured and economical arbitration process. For example, a mediator can:

- Facilitate agreement on exchange of document and other information;
- Help clarify which issues have been resolved in mediation and frame issues to be resolved in arbitration;
- Encourage parties to jointly submit the one or two most significant questions of law or fact to the arbitrator for speedy resolution, and then return to mediation.
- Assist in selection of an arbitrator;
- Help the parties define or refine any provided arbitration procedures;
- Remain available during the arbitration process itself as a resource to resolve issues informally.\textsuperscript{130}

\section*{3. Develop and publish rules that provide effective ways of limiting discovery to essential information.}

Because discovery is usually the chief determinant of arbitration cost and duration, and because arbitration procedures that leave parties and arbitrators significant "wiggle room"

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\textsuperscript{129} Posting by James M. Gaitis to mediate-and-arbitrate@peach.ease.lsoft.com (May 13, 2010) (on file with author).
\textsuperscript{130} See \textit{COMMERCIAL ARBITRATION AT ITS BEST}, \textit{supra} note 61, at 18.
\end{flushright}
often result in litigation-like discovery, provider institutions should develop and publish procedures that give business users the ability to effectively limit the scope of discovery in arbitration through their pre-dispute agreement. As a general matter, discovery should be restricted to information that is material and not merely relevant. Among the possible approaches to limiting discovery:

- limiting document production to documents or categories of documents for which there is a specific, demonstrable need; requiring parties to describe requested documents with specificity, explain their materiality, assure the tribunal they do not have the documents, and make clear why they believe the other party has possession or control of the documents;
- prohibiting requests for admission, and instead encouraging party representatives to confer regarding stipulation of facts;
- prohibiting form interrogatories and limiting the number of interrogatories;
- setting limits on the number and length of depositions, and limiting arbitrator discretion to authorize additional depositions to situations where there is a demonstrated need for the requested information, there are no other reasonable means of obtaining the information, and the request is not unduly burdensome to other parties;
- directing parties to cooperate on voluntary information exchange/discovery;
- directing arbitrators to manage discovery disputes as expeditiously as possible (e.g., by offering to resolve issues through prompt conference calls before resorting to extensive briefing and written argument);
- authorizing arbitrators to consider, when awarding fees and costs, the failure of parties to cooperate in discovery and/or to comply with arbitrator orders, thereby causing delays to the proceeding or additional costs to other parties.

Special attention should be given to detailed procedures for managing electronic records and handling electronic discovery much more efficiently than is currently done in federal and state courts. At a minimum, the description of custodians from whom electronic discovery can be collected should be narrowly tailored to include only those individuals whose electronic data may reasonably be expected to contain evidence that is material to the dispute and cannot be obtained from other sources. In addition to filtering data based on the custodian, the data should be filtered based on file type, date ranges, sender, receiver, search term or other similar parameters. Normally, disclosure should be limited to reasonably accessible active data from primary storage facilities; information from back-up tapes or back-up servers, cell phones, PDAs, voicemails and the like should only be subject to disclosure if a particularized showing of exceptional need is made.

Comments:\textsuperscript{131}

In litigation, parties have broad rights to discover any evidence that may be reasonably calculated to lead to the discovery of admissible evidence without regard to whether such

\textsuperscript{131} These comments are drawn in large part from Stipanowich, Arbitration and Choice, supra note 58, 414-425.
evidence is truly material to the outcome of the case.\textsuperscript{132} This approach, coupled with lack of focus at the outset of discovery, means that "discovery costs far too much and becomes an end in itself."\textsuperscript{133} Thus, the recent \textit{Final Report on Litigation Reform} calls for dramatic overhauling of the court discovery process based on a "principle of proportionality."\textsuperscript{134}

Parties who choose to arbitrate presumably do so with the expectation of reduced discovery. As observed in the Commentary to the \textit{CPR Rules},

"[a]rbitration is not for the litigator who will 'leave no stone unturned.'" Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to those items for which a party has a substantial, demonstrable need.\textsuperscript{135}

Yet, as discussed in Part II, discovery is now very much a part of arbitration processes.\textsuperscript{136} The rising scope and cost of discovery in arbitration have been a long time in the making, due in large part to the lack of formal guidelines. As technology, litigation intensity, and the popularity of arbitration have exacerbated the problem, the need for more comprehensive guidelines has become overwhelming. In cases of any size or complexity cogent arguments may be framed in support of document discovery and for a number of depositions. While there are those who will draw firm lines, the response will vary with the arbitrator. Arbitrators will be especially reluctant to draw lines in the face of a broad litigation-style discovery plan embraced by counsel for the parties.\textsuperscript{137} Because arbitration is first and last a consensual process, even arbitrators who suspect that business parties would have preferred a more attenuated process will tend to bow to a mutual agreement of the parties' counsel in the absence of (1) clear contractual guidance regarding the parties' intent to circumscribe discovery or (2) clear arbitral authority to modify the agreement of counsel regarding discovery. They are left with the alternative of encouraging or cajoling parties to consider more carefully tailored discovery; for

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\textsuperscript{132} \textit{The Federal Rules of Civil Procedure}, for example, state:

\textit{FED. R. CIV. P. 26(b)(1).}

\textsuperscript{133} \textit{Final Report on Litigation Reform}, supra note 60, at 2.

\textsuperscript{134} \textit{Id.} at 7-16.

\textsuperscript{135} \textit{CPR Rules}, supra note 62, Commentary to CPR Rule 11.

\textsuperscript{136} It is worth noting that we have evolved from no mention of prehearing discovery in the Federal Arbitration Act, 9 U.S.C. §§1-14 (1925), and the \textit{Uniform Arbitration Act} (1955) to highly deferential language in the \textit{Revised Uniform Arbitration Act} (2000).

\textsuperscript{137} The CPR Commentary encourages parties' counsel "to agree, preferably before the initial pre-hearing conference, on a discovery plan and schedule and to submit the same to the Tribunal for its approval." \textit{Id.}
this purpose, some arbitrators insist that business principals be present at the pre-hearing conference to participate in the discussion on discovery.\textsuperscript{138}

Parties desiring explicit, non-litigation-like guidelines for information exchange and discovery in arbitration, including those who are concerned about the impact of discovery on the cost and duration of arbitration, now have a variety of templates to consider.

1. Emerging discovery templates

Organizations that publish leading arbitration procedures and other institutions have begun to develop specific provisions setting clear limits on discovery or establishing standards to guide arbitral discretion in addressing discovery disputes.

\textit{The International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration}\textsuperscript{139} were an early and excellent standard aimed at limiting information exchange. Though designed for international proceedings that involve parties and practitioners from civil law countries as well as sovereign states applying common law, the \textit{IBA Rules} are sometimes applied by agreement in purely domestic (U.S.) arbitration. \textit{The ICDR Guidelines for Arbitrators Concerning Exchanges of Information} are a more recent standard designed for international disputes.\textsuperscript{140}

On the domestic scene, discovery limitations are most often built into streamlined or expedited arbitration rules like the \textit{JAMS Streamlined Arbitration Rules & Procedures}.\textsuperscript{141} The \textit{CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration} is another effort to offer counselors and drafters clear choices regarding information exchange and discovery.\textsuperscript{142} It offers parties the opportunity to select among several alternative standards regarding pre-hearing exchange of documents and witness information—some of which are useful templates.

Emerging standards may enhance the ability of arbitrators to effectively address information exchange issues by encouraging deliberate weighing of burdens and benefits. They

\textsuperscript{138} Alternatively, some arbitrators require principals of the clients to sign-off on any discovery plan submitted by outside counsel.

\textsuperscript{139} \textit{INTERNATIONAL BAR ASSOCIATION, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION} (May, 29 2010) [hereinafter IBA Rules], available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

\textsuperscript{140} \textit{INT’L CENTER FOR DISPUTE RESOLUTION, ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION} (May 2008) [hereinafter ICDR Guidelines], available at http://www.adr.org/si.asp?id=5288.

\textsuperscript{141} \textit{JAMS STREAMLINED RULES}, supra note 94, R. 13.

\textsuperscript{142} \textit{INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION} (2008) [hereinafter CPR PROTOCOL ON DISCLOSURE] (designed in part “to afford to parties to an arbitration agreement the opportunity to adopt certain modes of dealing with pre-hearing disclosures of documents and with the presentation of witnesses, pursuant to Schedules.”) available at http://www.cpradr.org/ClausesRules/CPRProtocolonDisclosure/tabid/393/Default.aspx.
may also offer arbitrators other tools, including explicit authority to condition production on the payment by the requesting party of associated reasonable costs.\textsuperscript{143}

2. Document exchange and discovery

Standard procedures often provide for some exchange of documents, at least to the extent they are non-privileged and relevant to the dispute.\textsuperscript{144} In some cases, such production is to occur within a fairly short time frame.\textsuperscript{145} Some parties, however, may want to narrow (or expand) this framework or establish more specific standards for document exchange.

A straightforward template for more limited information exchange/discovery may be found in the leading international standard on the subject, the \textit{IBA Rules on the Taking of Evidence in International Commercial Arbitration}.\textsuperscript{146} This standard, a compromise in which U.S.-style discovery is tempered by the influence of prevailing practices in civil law countries, initially requires each party only to submit "all documents available to it on which it relies."\textsuperscript{147} It also establishes a procedure for arbitral resolution of disputes over further document production that requires parties to describe requested documents with specificity, explain their relevance and materiality, assure the tribunal that they do not have the documents and make clear why they believe the other party has possession or control of the documents.\textsuperscript{148}

\begin{itemize}
\item[\textsuperscript{143}] \textit{See, e.g., Id. at § 1(e)(2). See also ICDR GUIDELINES, supra note 140, 8.a., which provides:}
\begin{quote}
In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.
\end{quote}

\item[\textsuperscript{144}] \textit{See, e.g., JAMS COMPREHENSIVE RULES, supra note 104, (providing for the parties to "cooperate in . . . the voluntary and informal exchange of all relevant, non-privileged documents, including, but without limitation, copies of all documents in their possession or control on which they rely in support of their positions.").}

\item[\textsuperscript{145}] The JAMS COMPREHENSIVE RULES call for document exchange "within twenty-one (21) calendar days after all pleadings or notice of claims have been received." JAMS COMPREHENSIVE RULES, supra note 104, Rule 17(a). Under the JAMS STREAMLINED ARBITRATION RULES \& PROCEDURES, this period is reduced to 14 days. See JAMS STREAMLINED RULES, supra note 67, R. 13(a).

\item[\textsuperscript{146}] IBA Rules, supra note 139.

\item[\textsuperscript{147}] Id., Article 3, Section 1.

\item[\textsuperscript{148}] The IBA Rules call for Requests to Produce to contain
\begin{itemize}
\item[(a)(i)] a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
\item[(b)] a description of how the documents requested are relevant and material to the outcome of the case; and
\item[(c)] a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.
\end{itemize}
\end{itemize}

\textit{Id. at 5.}
In a similar vein, the JAMS Streamlined Arbitration Rules & Procedures call for "voluntary and informal" exchange of all relevant, non-privileged documents and other information, but admonish parties to limit their requests to "material issues in dispute" and to make them "as narrow as reasonably possible." Depositions are not permissible "except upon a showing of exceptional need" and with arbitrator approval. Electronic data may be furnished in the form most convenient for the producing party, and broad requests for email discovery are not permitted.\(^{149}\) (The more expedited AAA Construction Industry Fast-Track Rules, aimed at smaller dollar claims, contemplate no discovery beyond exhibits to be used at the arbitration hearing "except . . . as ordered by the arbitrator in exceptional cases."\(^{150}\)

The CPR Protocol on Disclosure\(^{151}\) offers parties a choice of four discrete "modes" for document disclosure. These include: Mode A (No disclosure save for documents to be presented at the hearing); Mode B (Disclosure as provided for in Mode A together with "[p]re-hearing production only of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need"); Mode C (Disclosure provided for in Mode B together with disclosure, prior to the hearing, "of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure"); and Mode D (Pre-hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden).\(^{152}\) Some arbitrators limit each party to a certain number of document requests, including subparts.\(^{153}\)

3. Limits on depositions

In the interest of economy or certainty, some parties may want to provide that no depositions, or a specific, limited number of depositions, will be conducted in their

\(^{149}\) Compare JAMS STREAMLINED RULES, supra note 94, with CPR EXPEDITED ARBITRATION, supra note 65.

\(^{150}\) See AAA CONSTRUCTION INDUSTRY FAST TRACK RULE, supra note 64, F-9.


\(^{152}\) Id., Schedule 1.

A variant of this approach, used by some arbitrators, is to provide each party with a maximum number of hours for deposing persons within the other party's employ or control. Such limitations may be tempered by giving arbitrators discretion to allow additional depositions in exceptional circumstances where justice requires. A useful example of a clear limit coupled with narrowly cabined arbitrator discretion is contained in Rule 17 of the JAMS Comprehensive Arbitration Rules, which permits each party to take a single deposition; [t]he necessity of additional depositions is to be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing parties and the witness.

Another proposed response to the burgeoning discovery problem is the adoption of the international arbitration practice of substituting detailed sworn witness statements for direct examination. Such statements, provided to all participants in advance of the hearing, might provide a rough surrogate for depositions and save hearing time. Adjustments to the international practice, such as abbreviated direct examination, might be necessary to provide comfort to American lawyers and arbitrators. The new draft CPR Protocol on Disclosure offers parties the choice of embracing such an approach in their arbitration agreement, possibly in lieu of depositions.

### 4. Guiding and empowering arbitrators.

Another approach to controlling discovery hinges on and provides a useful framework for the “good judgment of the arbitrator.” A set of guidelines for arbitrator-supervised discovery developed by the New York State Bar Association (and subsequently adopted in summary form by JAMS) offers tools for arbitrators to manage discovery and other procedural aspects of arbitration. Such guidelines operate on the presumption that parties have not yet established strict guidelines for discovery, and therefore depend upon the arbitrator(s) to control discovery by giving early and active attention to the process, using persuasion and other methods to achieve results appropriate to the specific circumstances and the parties' indicated preferences (see Protocol for Arbitrators, Action 6).

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154 The ICDR GUIDELINES note that "[d]epositions, . . . as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration." ICDR GUIDELINES, supra note 140, 6.b.

155 See supra note 94 (discussing discretionary authority of arbitrator under JAMS STREAMLINED RULES).

156 JAMS COMPREHENSIVE RULES, supra note 104, Rule 17(b).

157 The witness statement concept is embodied in the IBA Rules. IBA RULES, supra note 139. Article 4, Sections 4-9.

158 CPR PROTOCOL ON DISCLOSURE, supra note 142, at 2-3, 5, 8-9.

Should arbitrators or counsel have the last word on the scope of discovery? In this respect, expert opinion and current standards vary, although under most standards arbitrators must respect and adhere to party agreements regarding discovery. The AAA Rules for Large, Complex Cases authorize the arbitrator(s) to override party agreements and "place such limitations on the conduct of such [agreed] discovery as the arbitrator(s) shall deem appropriate." 160 Although both the JAMS and CPR Rules give arbitrators considerable authority regarding exchange of information, neither set of procedures is explicit regarding the authority of arbitrators to "trump" or modify agreements regarding discovery; 161 however, the JAMS Arbitration Discovery Protocol recognizes that, while party agreements regarding the scope of discovery should be respected by arbitrators, "[w]here one side wants broad arbitration discovery and the other wants narrow discovery, the arbitrator will set meaningful limitations." 162

Since parties can always amend their arbitration agreements (even, in most jurisdictions, by amending the provision of the agreement that says it may only be amended by a writing signed by the CEOs of both companies), any provision giving the arbitrator the last word on discovery (or anything else) could theoretically be rescinded by a subsequent agreement of the parties. If that happens, the arbitrators should convene a meeting with

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160 AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2009) [hereinafter AAA COMMERCIAL RULES], L-4(c). An even stronger statement of the "final authority" of arbitrators regarding discovery is set forth in the ICDR GUIDELINES:

1. a. The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.

b. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority to apply the above standard. To the extent the Parties wish to depart from this standard, they may do so only on the basis of an express agreement in writing and in consultation with the tribunal. (Emphasis added.)

ICDR GUIDELINES, supra note 140, 1.a-b.

161 The JAMS COMPREHENSIVE RULES grant each party one deposition as of right, and call for "the necessity of additional depositions . . . [to] be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness." JAMS COMPREHENSIVE RULES, supra note 104, Rule 17(b). The JAMS COMPREHENSIVE RULES do not give any indication about what happens when the parties have agreed to multiple depositions.

While empowering the Tribunal to "require and facilitate such discovery as it shall determine is appropriate" taking into account parties' needs, expeditiousness and cost-effectiveness, the CPR RULES also do not address the impact of mutual agreement on discovery issues by the parties. CPR RULES, supra note 62, Rule 11. However, the CPR Protocol on Disclosure appears to anticipate that "[w]here the parties have agreed on discovery depositions, the Tribunal should exercise its authority to scrutinize and regulate the process . . . [and possibly impose] strict limits on the length and number of depositions consistent with the demonstrated needs of the parties." CPR PROTOCOL ON DISCLOSURE, supra note 142, at 5.

principals present and make sure that they (not just their counsel) want to override the "last word" provision so that outside counsel may engage in much more extensive (and costly) discovery than the arbitrator considers warranted.

5. E-discovery

Particularly troublesome has been the area of electronic discovery. As one leading participant in the development of guidelines for the management and discovery of electronic information explains,

If the law of e-discovery were allowed to develop on an ad hoc basis, one decision at a time, companies with their complex information technology systems would be eaten alive by process costs. It is essential to develop best practices that work in a real world.163

The challenge for arbitrators and arbitration providers is to address these same concerns effectively, but in the context of a highly discretionary system without uniform rules or precedents that is conventionally aimed at efficiency and expedition in conflict resolution.164 Issues include the essential scope of and limits on e-discovery, and the weighing of burdens and benefits;165 the handling of the costs of retrieval and review for privilege;166 the duty to preserve electronic information, spoliation issues and related sanctions.167

Will it be possible for arbitrators to effectively meet the challenges of e-discovery in an efficient and relatively economical manner? The answer will depend in part on the effectiveness of choices made by counselors and drafters. But they cannot make good choices when good choices are not drafted and promoted by arbitration providers.

Arbitral institutions are in a unique position to assume more responsibility for providing this critical guidance. Concerns regarding the relative burdens associated with e-discovery may lead parties to consider adopting language similar to that contained in the ICDR Guidelines.

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165 See generally *The Sedona Guidelines*, supra note 163.

166 For a discussion of these and other issues, see John B. Tieder, *Electronic Discovery and its Implications for International Arbitration*; (unpublished article, on file with Watt, Tieder, Hoffar & Fitzgerald, LLP); Jessica L. Repa, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in Zubulake Unduly Stifles Cost-Shifting During Electronic Discovery*, Comment, 54 AM. U. L. REV. 257 (Oct. 2004); Warshauer, supra note 164, at 11 (discussing the development of "claw-back" agreements, which permit a party to produce all of its relevant documents for review without waiving privilege).

which permit a party to make documents maintained in electronic form "available in the form . . . most convenient and economical for it, unless the Tribunal determines, on application . . . that there is a compelling need for access to the documents in a different form."\textsuperscript{168} Moreover, requests for such documents "should be narrowly focused and structured to make searching for them as economical as possible." The \textit{Guidelines} conclude by permitting arbitrators to engage in "direct testing or other means of focusing and limiting any search."\textsuperscript{169} The use of "test batch production"—such as pilot tests using key search words on a limited scale—is emerging as a critical way of identifying areas that require special attention in advance of major production.

Parties may be able to avoid many of the costs—if not all the risks—of the revelation of privileged material in electronic data by agreeing to have the arbitrators issue a pre-arbitral order relieving the parties of the obligation to conduct a pre-production privilege review of all electronic documents and ordering that the attorney-client and work product privileges are not waived by production of documents that have not been reviewed.\textsuperscript{170} Parties may also wish to consider identifying likely informational needs and agreeing on what information needs to be preserved, in what format, and for how long.\textsuperscript{171}

A prototypical, multi-faceted template addressing various aspects of pre-hearing disclosure of electronic information is contained in the \textit{CPR Protocol on Disclosure}.\textsuperscript{172} That Protocol presents parties with four discrete alternatives regarding pre-hearing disclosure of electronic documents. The alternatives range from no-pre-hearing disclosure, except with respect to copies of printouts of electronic documents to be presented in the hearing, to full disclosures "as required/permission under the \textit{Federal Rules of Civil Procedure}." The intermediate options permit parties to limit production to documents maintained by a specific number of designated custodians, to limit the time period for which documents will be produced, to identify the sources (primary storage, back-up servers, back-up tapes, cell phones, voicemails, etc.) from which production will be made, and to determine whether or not information may be obtained by forensic means.\textsuperscript{173}

\textsuperscript{168} ICDR GUIDELINES, supra note 140, Section 4.

\textsuperscript{169} \textit{Id}.

\textsuperscript{170} Warshauer, supra note 164, at 11.


\textsuperscript{172} See Newman & Zaslowsky, supra note 81.

\textsuperscript{173} See \textit{CPR PROTOCOL ON DISCLOSURE}, supra note 142, Schedule B, Modes B, C. The Protocol also offers a set of General Principles which may be adopted by themselves or in tandem with a particular "mode" for pre-hearing disclosure of electronic documents. It provides:

In making rulings on pre-hearing disclosure, the tribunal should bear in mind the high cost and burden associated with requests for the production of electronic information. It should be recognized that e-mail and other electronically created documents found in the active or archived files of key witnesses or in shared drives used in connection with the matter at issue are more readily accessible and less burdensome to produce when sought pursuant to reasonably specific requests. Production of electronic materials from a wide range of users or custodians tends to be costly and burdensome and should not be permitted without a showing of
6. Other considerations

Depending on the circumstances, parties may consider it appropriate to include other provisions, such as a term giving arbitrators explicit authority to weigh the burdens and benefits of a discovery request, or the ability to condition disclosure on the requesting party paying reasonable costs of production.\(^{174}\) It may serve efficiency to provide that the chair of the tribunal serve as discovery master; in cases in which confidentiality of sensitive information is of prime concern, there might be a provision for the use of a special master to supervise certain aspects of discovery.\(^{175}\)

4. **Offer rules that set presumptive deadlines for each phase of the arbitration; train arbitrators in the importance of enforcing stipulated deadlines.**

In the interest of economy and efficiency, providers should ensure that parties have the opportunity to adopt arbitration procedures that include a presumptive deadline for completion of arbitration. The procedures should facilitate compliance with the final deadline through the inclusion of presumptive time limits for each phase of the arbitration, and by giving arbitrators explicit authority to employ procedures and set deadlines appropriate to the goal of meeting the overall deadline. Providers should also ensure that their training programs offer arbitrators instruction in the importance of adhering to stipulated timetables or deadlines for arbitration except in circumstances clearly beyond the contemplation of the parties when the time limits were established (see *Protocol for Arbitrators*, Action 3).

Comments:


5. **Publish and promote "fast-track" arbitration rules.**

Providers should offer a variety of procedural choices with varying degrees of emphasis on expedition and economy, including at least one set of procedures that place heavy emphasis on those goals (see *Protocol for Business Users and In-House Counsel*, Action 4). A "fast-track" approach may feature some or all of the following:

- relatively short presumptive deadlines;
- limits on the number of arbitrators;

\(^{174}\) *See supra* note 89.

\(^{175}\) *See JAMS COMPREHENSIVE RULES*, *supra* note 104, Rule 17(b).
• expedited arbitrator appointment procedure;
• early disclosure of information;
• heavily curtailed discovery and motion practice;
• limits on the length and form of the award.

If fast-track procedures are published separately from a provider's standard procedures, the provider should take measures to ensure that users are equally aware of the fast-track option and are provided with user-friendly guidance on how and when to employ the fast track procedures.

Comments:
See comments under Protocol for Business Users, Action 3.

6. **Develop procedures that promote restrained, effective motion practice.**

Properly employed, motions to narrow or dispose of claims or defenses can promote efficiency and economy in arbitration. Presently, however, there are two major concerns about motion practice in arbitration: (a) the reflexive use of motion practice in arbitration by some litigation attorneys, and (b) the reflexive denial of motions by arbitrators pending a full-blown hearing on the merits of the entire case. Providers should attempt to address these concerns by publishing guidelines for effective and efficient resolution of motions, particularly dispositive motions. This might involve a simple method for screening motions at the outset, including factors to be considered by arbitrators in deciding whether to entertain a motion. In the interest of time- and cost-saving, would-be movants might be required to set up a conference call with the arbitrator(s) and opposing counsel to discuss the issue before filing any motion (see Protocol for Business Users, Action 9; Protocol for Arbitrators, Action 7).

Comments:

7. **Require arbitrators to have training in process management skills and commitment to cost- and time-saving.**

Provider institutions should conduct training in managing hearings fairly but expeditiously, with particular emphasis on ways of reducing cost and promoting efficiency, and should require arbitrators to complete such training before being included on the provider's roster, and to update their knowledge and skills annually. Providers should also consider requiring arbitrators to make a pledge to actively seek ways to promote cost- and time-saving in a manner consistent with the agreement of the parties and fundamental fairness (see Protocol for Arbitrators, Action 1).
Comments:

Arbitrators need to anticipate that their predominant challenges are more likely to be encountered during the period prior to hearings. Of increasing importance is the critical role of the pre-hearing conference in establishing discovery and motion practice guidelines for the rest of the arbitration process. Arbitrators must be equipped with process management skills not only for the hearing itself, but for the pre-hearing period.

Among the many steps that skilled arbitrators may take during pre-hearing case management are the following: promoting dialogue between parties; addressing jurisdictional issues; developing a timetable and management plan; addressing requests for interim relief; facilitating information exchange and discovery; addressing dispositive motions; planning the hearings; planning the form of the final award; administrative details like rules, locations, fees, confidentiality, and communication methods.176

An arbitrator with a proper skill set will approach the pre-hearing proceedings as aggressively and deliberately as the hearings themselves, increasing the likelihood not only of achieving resolution of the matter before the hearing begins, but of ensuring a hearing that has set and met parties' expectations for efficiency.

8. Offer users a rule option that requires fact pleadings and early disclosure of documents and witnesses.

Providers' should afford users the option of adopting rules that require fact pleading rather than notice pleading in both demands and answers, and require that claimants and respondents serve with their initial pleadings a detailed statement of all facts to be proven, all legal authorities relied upon, copies of all documents supporting each claim or defense, as well as a list of witnesses they expect to call. Such rules should require that parties supplement their documents and witness lists periodically prior to the hearing.

Comments:

See Protocol for Business Users, Action 8, and the related entry in Appendix A.


Arbitration procedures should require that all pleadings, motions, orders and other documents filed in the arbitration be served electronically on each arbitrator and each parties' counsel except where that method of service is impractical (as with documents of too great a length to be conveyed electronically) or where other special considerations require another method.

Comments:

A number of providers and services have begun providing for electronic service of arbitration-related documents. See Appendix A for examples.

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176 COMMERCIAL ARBITRATION AT ITS BEST, supra note 61, Ch. 4.
10. Obtain and make available information on arbitrator effectiveness.

Providers should conduct a post-arbitration telephone interview with arbitrating parties and counsel to obtain information on arbitrator effectiveness in managing arbitration fairly and expeditiously. Such information should periodically be furnished to arbitrators in a way that precludes their identifying the sources of the comments. Such information should also be made available in summary form (and without attribution) to parties and counsel selecting arbitrators. Providers should remove from their rosters those arbitrators who prove incapable of efficiently managing business arbitrations (see Protocol for Business Users, Action 7).

Comments:
Perhaps more commonly associated with other dispute resolutions processes, evaluation of neutrals should be a core service offered by arbitration providers. As standards evolve, arbitrators must continue to be held accountable for their knowledge and skill levels. Care should be taken to focus evaluations on objective measures of arbitrators’ management skills and knowledge levels and to make effective use of timing and language to prevent evaluations from being colored by arbitration outcomes.177

11. Provide for expedited appointment of arbitrators.

Provider rules should expedite the selection of the tribunal by providing that, if all arbitrators have not been appointed within a specific time (say, thirty days from the filing of the arbitration demand), the provider will appoint the arbitrators. The rules should also impose stringent time limits for all communications by parties and by prospective arbitrators that are required as a part of the appointment process.

Comments:
Arbitrations can be greatly delayed when the appointment of arbitrators drags on for many weeks or even months. While arbitrator selection is certainly an important step in the arbitration process, it is one that can be accomplished expeditiously by diligent counsel, particularly when the rules furnish the strong incentive of divesting foot-dragging parties of the right to select their arbitrators.

See below for examples of expedited procedures for appointment of arbitrators.

- AMERICAN ARBITRATION ASSOCIATION, AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, SECTION E: EXPEDITED PROCEDURES R. 4 (June 1, 2009), available at http://www.adr.org/sp.asp?id=22440. (“If the parties are unable to agree... each party may strike two names from the list [of arbitrators] and return it to the AAA within seven days

177 Cf. Donald P. Crane & John B. Miner, Labor Arbitrators’ Performance: Views from Union and Management Perspectives, 9 J. Lab. Res. 1 (Mar. 1988) (discussing a study of performance evaluations of labor arbitrators by union representatives and management representatives that found the arbitrators’ awards to so color the evaluation results that the results were either unrelated or negatively related).
from the date of the AAA’s mailing... If the appointment... cannot be made from the list, the
AAA may make the appointment...”)

- **American Arbitration Association, Securities Arbitration Supplementary Procedures R. 3(a)** (June 1, 2009), available at http://www adr.org/sp.asp?id=22009 (“The list [of proposed arbitrators] must be returned to the AAA within 10 days from the date of the AAA's transmittal to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment . . .”).

- **ADR Chambers, Expedited Arbitration Rules R. 5 (2010), available at** http://adrchambers.com/ca/expedited-arbitration/expedited-arbitration-rules/ (“If ADR Chambers is not notified of the selection of an arbitrator... within 5 business days after the Response has been delivered . . . ADR Chambers will select the arbitrator . . .”).

- **American Dispute Resolution Center, Inc., Rules of Expedited Construction Arbitration R. E-4 (Sept. 11, 2009), available at** http://www.adrcenter.net/pdf/Construction/ExpRules.pdf (“The parties must return their selections to ADR Center within ten calendar days. If ADR Center is unable to appoint the arbitrator from the parties' selections, the Case Manager will appoint the arbitrator.”).

### 12. Require arbitrators to confirm availability.

Providers should require arbitrators being considered for appointment in expedited proceedings to expressly confirm their availability to both manage and hear the case within a specific number of days prior to being confirmed.

**Comments:**

Per the 2009 International Arbitration Report, the ICC Court now requires arbitrators agreeing to serve in ICC arbitrations to disclose details regarding their availability.¹⁷⁸

Similarly, the **CPR Expedited Arbitration Rules** provide:

Any arbitrator appointed by the parties or by the CPR Institute shall accept appointment by expressly representing to the CPR Institute within 2 days of appointment that he or she has the time available to devote to the expeditious process and time periods for Pre-hearing Conference, discovery, hearing and award contemplated by these Rules and to facilitate the expedition contemplated in these Rules.¹⁷⁹

Obviously, most arbitrators understand the concept of scheduling, but requiring explicit affirmation of availability is intended to serve as reminder to all arbitrators of the importance of avoiding unnecessary delay throughout the entire process. In fact, with the advent of


¹⁷⁹ [CPR Expedited Arbitration Rules, supra note 65, Rule 7.2.](http://adrchambers.com/ca/expedited-arbitration/expedited-arbitration-rules/)
electronic calendars, the day is not far off when parties will be able to view prospective arbitrators’ calendars to determine for themselves if candidates have sufficient time available in the relevant time frame.

13. **Afford business users an effective mechanism for raising and addressing concerns about arbitrator case management.**

Providers that offer administrative services, including arbitrator appointment services, should offer users a meaningful mechanism (such as a designated ombud) for addressing party concerns and complaints regarding the arbitrators or the arbitration process. Among other things, the individual/office would be authorized to explore opportunities for addressing concerns about process speed and cost.

**Comments:**

Identifying and resolving issues with arbitrator case management while still mid-process has a number of advantages, including preserving efficiency; identifying long-term issues with procedures or arbitrators while the matter is still fresh; and increasing party satisfaction with outcomes.

Conflict resolution studies have shown that outcome satisfaction is generally improved by the opportunity to provide feedback during the proceedings. "Increasing shared information is a basic strategy in ameliorating all conflicts. Consultation and feedback mechanisms between parties provide a consistent and reliable method of sharing information."\(^{180}\)

14. **Offer process orientation for inexperienced users.**

Providers should make available to business parties and to counsel online or in-person orientation programs that summarize and illustrate (a) the principal differences between arbitration and litigation and (b) how to use arbitration to accomplish the parties' goals of fair, economical and efficient resolution of disputes.

**Comments:**

Properly educated parties are far more likely to accept efficient process options, establish a constructive tone, set aside courtroom-style tactics in favor of flexibility, and reach an outcome without being frustrated by preconceptions regarding arbitration.

Note that—as discussed under Action 1—user feedback can be an effective way to "sell" a process to parties unfamiliar with the distinctions between arbitration and litigation.\(^{181}\)

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A Protocol for Outside Counsel

Business users depend on outside counsel to promote their business interests, which often include economy and efficiency, in arbitration. Outside counsel should be careful to clarify their client’s goals and expectations for resolving disputes, and should approach arbitration in a manner that reflects these expectations and exploits the differences between arbitration and litigation. The following Actions are offered as specific guidance to Outside Counsel for this purpose.

1. Be sure you can pursue the client’s goals expeditiously.

Outside counsel should only accept an advocacy role in arbitration when they have determined what the client’s goals are in the particular case and are sure they have the knowledge, experience, and availability to pursue those goals effectively, efficiently and expeditiously. They should be familiar with the arbitration rules and provider involved in the particular case and should have in-depth knowledge of ways to save time and money in arbitration without compromising either the fairness of the process or the soundness of the result. They should also be certain that they or a partner have the negotiation and mediation skills that may be required at various stages of the arbitration.

Comments:

Rules of professional responsibility in nearly all jurisdictions make it unethical for attorneys to accept an engagement which they are not competent to perform.\(^{182}\) While that provision has generally been thought to require knowledge and experience in the type of substantive work the attorney is being asked to carry out, the recent client focus on reducing excessive cost and delay in commercial arbitration suggests that the ethical obligation may well extend to knowledge of how to conduct an arbitration efficiently and expeditiously. Arbitration is quite different from litigation in many respects, and techniques that work well in one process may be ineffective, even harmful in the other. Counsel who agree to represent parties in commercial arbitrations need to have a solid understanding of the arbitration rules that will apply, the practices of the provider that is administering the arbitration, and the growing body of state and federal arbitration law. They should know how to navigate the arbitration process in an economical yet effective way. Since arbitrations frequently require or precipitate negotiations and/or mediation between the parties, whoever will serve as lead counsel at the arbitration hearing should be certain that he or she or a partner has the skill needed to effectively conduct such adjunct activities.

2. **Memorialize early assessment and client understandings.**

Outside counsel should provide the client at the outset with a careful early assessment of the case, including a realistic estimate of the time and cost involved in arbitrating the matter at various levels of depth and detail. Counsel should reach an understanding with the client concerning the approach to be followed, the extent and nature of any discovery to be initiated, the possibility and desirability of a negotiated settlement, the desired overall timetable for arbitration, and the resources the client is prepared to devote to the matter. Counsel should memorialize those understandings in writing and should adhere to the client's expectations and budget. Counsel should periodically review these understandings with the client and should memorialize any significant changes in the client's instructions (see *Protocol for Business Users and In-House Counsel*, Actions 5, 6).

**Comments:**

Studies show that many disputes arise between clients and counsel because of a failure to reach, at the outset of the engagement, a clear understanding of what counsel is expected to do (and not do) and what that work will likely cost the client. The potential for such problems are clearly present in engagements, like arbitration and litigation, where the lawyer’s work may be quite intensive and extend over a period of many weeks. It is essential that outside counsel should make an early and realistic assessment of the case, including the cost and time which various alternative approaches to the arbitration may involve. Ultimately it is up to the client to determine, as a matter of business priorities, what amount of time and money it is willing to devote to the case. Once that decision is made, outside counsel should memorialize it in writing, along with other important client instructions, and should revisit the matter periodically and note any changes that may have occurred in the client's expectations.

3. **Select arbitrators with proven management ability. Be forthright with the arbitrators regarding your expectations of a speedy and efficient proceeding.**

Outside counsel should help their client select arbitrators with the experience, knowledge and capabilities that are likely to further the client's business goals, including expectations as to cost and time. Counsel should do a thorough "due diligence" of all potential arbitrators under consideration and should, consistent with the Code of Ethics for Arbitrators in Commercial Disputes, interview them concerning their experience, case management practices, availability and amenability to compensation arrangements that would incentivize them to conduct the arbitration efficiently and expeditiously.

Parties desiring speed and economy in the arbitration process should be forthright in conveying their expectations to the arbitrators regarding the duration of the proceedings, beginning at the time candidates for appointment as arbitrator are identified. These expectations can be set down in writing at the beginning of the arbitration process and, even

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if unilateral and non-binding, may have an impact on scheduling and management decisions made by the arbitrators during the proceedings (see Protocol for Arbitrators, Action 3).

Comments:

One of the most important functions of outside arbitration counsel is selecting, in consultation with in-house counsel, the arbitrator(s) for the case. In addition to the traditional considerations such as intelligence, integrity, familiarity with the subject matter, and availability, outside counsel these days also need to determine whether the arbitrator candidates have the knowledge, skill and temperament to manage the arbitration efficiently. Much can be learned on this score by talking with lawyers who have participated in other cases the candidates have arbitrated and by interviewing the candidates concerning the procedures and practices they follow in conducting arbitrations.184 Counsel should advise the candidates of their client's expectations concerning the cost and length of the arbitration proceedings and should determine whether the candidates are able and willing to meet those expectations. It is not inappropriate to ask prospective arbitrators, through the case manager, about their availability to conduct the hearing during a specific time frame.185 Counsel may also wish to explore with the candidates alternative billing arrangements that may encourage them to manage the arbitration efficiently.

4. Cooperate with opposing counsel on procedural matters.

If saving time and money is an important client goal in the arbitration, counsel should make clear to the client that the fullest benefits of time- and cost-saving (i.e., those concerning procedures for preparing for and conducting the hearing) can ordinarily only be achieved when opposing counsel cooperate fully and freely with each other and with the arbitrator to achieve those benefits. Counsel should obtain the client's consent to such cooperation and should pursue that approach regarding all procedural and process issues in the arbitration. Counsel should meet and confer early with opposing counsel in order to foster a cordial and professional working relationship and to reach as many agreements as possible concerning matters that will be taken up at the Preliminary Conference and should continue to meet and confer regularly thereafter (see Protocol for Arbitrators, Actions 2, 3, 4).

Comments:

Psychologists tell us that, when people have a dispute, there is a natural tendency ("reactive devaluation") to view with suspicion anything proposed by the other side.186 This phenomenon, coupled with the hostility often accompanying commercial conflict and the ego satisfaction of trouncing one's opponent, frequently impels counsel in arbitration and litigation

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184 Canon III of the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes (2004) provides that a prospective arbitrator may respond to party inquiries designed to determine his or her suitability and availability for the appointment but may not engage in ex parte communications concerning the merits of the case.

185 This procedure is already offered, for example, by CPR Institute’s Director of Dispute Resolution Services.

to fight with their opposite number on every substantive and procedural aspect of the case. The most sophisticated outside counsel realize, however, that zealous advocacy on the merits does not preclude cooperation on procedure, which is typically in the best interest of both parties, especially if they wish to reduce cost and delay. Arbitration being entirely a creature of party agreement, arbitrators normally solicit agreement on procedural matters more aggressively than judges and will not take kindly to counsel who refuse to agree to sensible process arrangements. In most cases, if counsel pursue a professional and cooperative relationship with each other concerning the scope of discovery and motions, the length and location of the hearing, stipulations on facts not genuinely in dispute, and similar matters, it is possible to achieve substantial savings of time and money without compromising the client's substantive position. If in-house counsel is inexperienced in arbitration, it may be necessary for outside counsel to explain why such cooperation is beneficial for the client and secure the client's consent to such an approach.

5. **Seek to limit discovery in a manner consistent with client goals.**

Make clients aware that ordinarily discovery in arbitration will be much more limited than in litigation, even in the absence of clear rules and guidelines, and cooperate with opposing counsel and the arbitrator in looking for appropriate ways to limit or streamline discovery in a manner consistent with the stated goals of the client (see *Protocol for Arbitrators*, Action 6).

**Comments:**

Discovery is far and away the greatest driver of cost and delay in litigation and in arbitration. In the *Protocol for Arbitration Providers*, Action 3 and the accompanying commentary discuss thoroughly the opportunities and resources available to in-house and outside counsel to greatly reduce discovery in arbitration, thus capitalizing on one of its principal advantages over litigation. Outside counsel have an obligation to make sure the client understands the limitations inherent in arbitration discovery, to assess how much (if any) discovery is truly needed in the case, and to ascertain how much time and money the client is willing to expend in turning over stones. Once that assessment is made, outside counsel should cooperate with opposing counsel and the arbitrator in establishing discovery limitations that match the client's goals.

6. **Periodically discuss settlement opportunities with your client.**

During the arbitration, counsel should periodically discuss with their client the possible advantages of settlement and opportunities that may arise for pursuing settlement. Unless the case has been thoroughly mediated already, counsel should ask the client to consider the possibility of mediating with an experienced mediator (who is not one of the arbitrators) at an appropriate stage in the arbitration, before substantial sums are spent on preparing for and conducting the hearing.
Comments:

In arbitration as in litigation, a reasonable settlement that avoids risk and heavy transaction costs is often in a client's best interest. Some clients seem to think that settlement may be pursued before arbitration but not once the arbitration has begun. In fact, propitious opportunities for settlement often appear at multiple points during arbitration, including during discussions with opposing counsel in preparation for the preliminary conference, after briefing or rulings on significant threshold matters, on completion of all or particular discovery, after submission of dispositive motions, during the hearing, and after submissions of post-hearing briefs. At all of these stages, outside counsel should re-evaluate their initial case assessment and discuss with the client the pros and cons of pursuing settlement. If a professionally conducted mediation did not precede the arbitration (and sometimes even if it did), counsel should raise with the client the possibility of a thorough mediation with a neutral not involved in the arbitration. In major cases, some experienced outside counsel like to establish two parallel tracks toward resolution, namely, the arbitration conducted by arbitration counsel and a separate, ongoing mediation dialogue conducted by separate counsel who are particularly skilled in the quite different mediation process.

7. Offer clients alternative billing models.

Counsel should offer clients professional service models other than an hourly fee basis, including models that provide incentives for reducing cycle time or the net costs of dispute resolution (see Protocol for Business Users, Action 6).

Comments:

In-house counsel are increasingly demanding that outside counsel offer alternatives to hourly billing. Arrangements such as a fixed fee for the entire arbitration or a reduced hourly rate coupled with a "success bonus" of some sort may reduce the client's transaction costs and incentivize economy and efficiency by outside counsel.\textsuperscript{187}

8. Recognize and exploit the differences between arbitration and litigation.

Counsel should recognize the many differences between litigation and arbitration, including the absence of a jury on whom rhetorical displays and showboating may have some effect. Arbitrators are generally experienced and sophisticated professionals with whom posturing and grandstanding are almost always inappropriate, counter-productive, and wasteful of the client's time, money and credibility with the arbitrators. Counsel should keep in mind that dispositive motions are rarely granted in arbitration, and should employ such motions only where there will be a clear net benefit in terms of time and cost savings. Counsel should be aware that arbitrators tend to employ more relaxed evidentiary standards, and should therefore avoid littering the record with repeated objections to form and hearsay. An

\textsuperscript{187} Ian Meredith & Sarah Aspinall, Do Alternative Fee Arrangements Have a Place in International Arbitration?, 72 ARBITRATION 22, 22-26 (2006).
advocate who objects at every turn is likely to try the patience of a tribunal and undermine his or her own credibility (see Protocol for Arbitrators, Actions 6, 7, 9).

Comments:

Veteran actors know that the gestures and speech patterns that work well on the stage are often ineffective, even annoying in the much different milieu of cinema or television. Arbitration is a much different milieu from litigation and requires similar adjustments in technique. Outside counsel who are serious about reducing cost and delay in arbitration must be thoroughly familiar with those differences, some obvious, some subtle, and adapt their strategy and style in ways that capitalize on arbitration's flexible, streamlined, more intimate character.

9. Keep the arbitrators informed and enlist their help promptly; rely on the chair as much as possible.

Counsel should work with opposing counsel to keep the arbitrators informed of developments in the interval between the preliminary conference and the hearing so that the arbitrators may assist in resolving potential problems and avoid inefficiencies and unnecessary expenditures of time at the hearing. If it becomes apparent during the pre-hearing phase that one or more significant pre-hearing issues cannot be resolved by agreement of the parties, counsel should not delay in putting the arbitrators to work. Failure to do so could result in the need to postpone the hearing, thus generating avoidable delay and unnecessary costs. Agreement to have the chair of a three-arbitrator tribunal resolve discovery, scheduling, and other procedural orders will generally produce significant savings of time and money without impairing any party's substantive rights (see Protocol for Business Users, Action 10; Protocol for Arbitrators, Action 8).

Comments:

Counsel who are primarily litigators and accustomed to dealing with overloaded, somewhat inaccessible judges often fail to take advantage of one of the key benefits of arbitration, namely, readily available decision-makers. Arbitrators who are good case managers know that festered, unresolved issues can seriously derail the best of schedules and thus welcome the opportunity to promptly break any logjams that counsel cannot quickly clear. Outside counsel should not be shy in seeking arbitrator assistance whenever good faith cooperation fails to resolve any process impediments. Many such obstacles can be removed in a short conference call with a sole arbitrator or tribunal chair, without necessity of any written submissions that drive up costs. The flexibility, informality and economy potential of arbitration can only be fully realized if counsel share responsibility with the arbitrators for moving the case along at a brisk pace.

10. Help your client make appropriate changes based on lessons learned.

Once arbitration is completed, counsel should conduct an evaluation of the entire process with the client and attorneys involved in the representation. Counsel should memorialize
lessons learned and make appropriate changes to dispute resolution provisions, firm arbitration training, and firm procedures and policies (see Protocol for Business Users, Action 12).

**Comments:**

Action 12 of the Protocol for Business Users and In-House Counsel describes the sort of post-arbitration evaluation that should be conducted by in-house counsel in every case. Outside counsel should be part of that evaluation. In addition, however, outside counsel should conduct their own internal assessment of how they performed in the subject engagement. Did they make an accurate initial assessment of the case? Did they establish with the client a clear understanding of the client's goals and the way in which counsel would pursue them, including the cost and length of the arbitration? Did they take advantage of all opportunities presented for reducing transaction time and costs? What could they have done better? Only by answering questions of this kind will outside counsel be equipped to make necessary changes in their retainer agreements and billing models, training programs, and arbitration procedures and strategy.

**11. Work with providers to improve arbitration processes.**

Outside counsel should work with arbitration providers to create more effective choices for business arbitration through the development of new alternative process techniques, rules and clauses.

**Comments:**

Insights gained by outside counsel during arbitration and through post-arbitration evaluations can be very helpful to providers in improving their clauses, rules and administrative procedures. Outside counsel should freely share such insights with providers to the extent that is consistent with the client's business goals and any confidentiality provisions in the subject arbitration.

**12. Encourage better arbitration education and training.**

Outside counsel should help improve laws governing dispute resolution, including arbitration, and should encourage more effective legal, business and judicial education regarding arbitration and other forms of dispute resolution.

**Comments:**

Through their affiliations with law schools, bar associations, other professional organizations, and various local and national civic groups, outside counsel are often in a position to affect education and legislation concerning arbitration. Improving arbitration awareness and understanding among business executives, lawyers, judges and the general public increases the opportunities for effective use of this valuable dispute resolution process and may have the collateral benefit of increasing the demand for counsel's arbitration services.
A Protocol for Arbitrators

Whether or not business users have tailored arbitration procedures to most effectively promote economy and efficiency, they commonly rely on arbitrators to conduct arbitration proceedings economically and efficiently. Arbitrator training, experience and philosophy may all play a part in their ability to accomplish these goals through thoughtful case management; adherence to contractual limits on discovery, timetables, etc.; and effectively distinguishing, and appropriately acting upon, dispositive motions that might conclude or streamline a dispute. The following Actions are offered as detailed guidance for arbitrators in addressing these concerns.

1. Get training in managing commercial arbitrations.

It is axiomatic that all arbitrators should have the knowledge, temperament, experience and availability required by the appointment, as well as a working knowledge of arbitration law, practice and procedures of administrative organizations, and the various opportunities for realizing economies and efficiencies throughout the arbitration process. Those who wish to arbitrate large and complex commercial cases should secure special training in how to manage such arbitrations with expedition and efficiency without sacrificing essential fairness, should identify that training in their biographical materials, and should pledge to conduct the arbitration so as to adhere to any time limits in the arbitration agreement or governing rules (see Protocol for Arbitration Providers, Action 7).

Comments:

Just as "one size fits all" is not a cost-saving approach to arbitration rules, it is also true that being an effective arbitrator in one field does not assure effectiveness in another. Commercial arbitration, for example, is quite different from labor arbitration or consumer arbitration. One serving as an arbitrator in any of these fields should be well grounded in the arbitration law, practice, and management techniques particular to that field. Fortunately, many institutions, including the American Bar Association, the American Arbitration Association, JAMS and CPR, offer specialized instruction in managing the sort of large, complex cases that typify commercial arbitration. In addition, there are a number of excellent published practice guides, including The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (James M. Gaitis, Curtis E. von Kann & Robert W. Wachsmuth, eds. 2nd ed. Juris Net 2010) and Commercial Arbitration at Its Best: Successful Strategies for Business Users (Thomas J. Stipanowich & Peter H. Kaskell, eds. 2001). In short, the resources are there for those who seek to learn how to arbitrate commercial cases fairly but efficiently.

2. Insist on cooperation and professionalism.

Arbitrators should communicate clearly and unequivocally from the outset their expectation that counsel can and will cooperate fully and willingly with each other and with the arbitrator in all procedural aspects of the arbitration. Arbitrators should establish a professionally cordial atmosphere, one that reinforces expectations of cooperation and reasonableness and
affords counsel the fullest opportunity to contribute to shaping the arbitration process. Arbitrators should lead by example by being prepared and punctual for all arbitration proceedings and by fixing and meeting deadlines for their own actions, such as ruling on motions, issuing orders and the like (see Protocol for Outside Counsel, Actions 4, 5, 8).

Comments:

Arbitrators set the tone of any arbitration, and establishing a tone of professionalism and mutual respect among participants greatly increases the prospects for developing cooperative approaches to expedite the proceedings. Arbitrators must make clear that they expect reasonable and constructive conduct by counsel and must model such conduct in their own interactions with counsel and parties. Arbitrators can hardly insist on counsel's compliance with deadlines if they themselves are late in issuing rulings, appearing at hearings, and the like. Arbitrators who make their expectations of cooperation clear and lead by example will have built a solid foundation on which to rest reasonable and efficient management actions.

3. Actively manage and shape the arbitration process; enforce contractual deadlines and timetables.

Arbitrators should recognize that commercial parties are generally looking for "muscular" arbitrators who will take control of the arbitration and actively manage it from start to finish, encourage and guide efforts to streamline the process, make a serious effort to avoid unnecessary discovery or motions, and generally conduct the arbitration fairly and thoughtfully but also expeditiously. Commercial arbitrators should utilize their considerable discretion and the natural reluctance of counsel and parties to please the ultimate decision-maker so as to fashion, with the input and cooperation of the parties and their counsel, an arbitration process that is appropriate for the case at hand and as expeditious as possible while still affording all parties a full and fair hearing.

Arbitrators should routinely enforce contractual deadlines or timetables for arbitration except in circumstances that were clearly beyond the contemplation of the parties when the time limits were established (see Protocol for Business Users, Action 3). They should also encourage parties to "tee up" particular issues for early resolution when the resolution of such issues is likely to promote fruitful settlement discussions or expedite the arbitration (see Protocol for Arbitration Providers, Action 6; Protocol for Outside Counsel, Action 8).

Comments:

A recurrent plea from National Summit participants was that arbitrators take active control of commercial arbitrations. Even when counsel are cooperating with one another, there are inevitably many points during an arbitration when someone needs to make a decision or take other action to keep the proceeding "on time and under budget." All arbitration rules give arbitrators considerable discretion in managing the arbitration process. Business users, in-house counsel, and outside counsel want arbitrators who will accept that responsibility and act. Especially if they have set a collegial tone at the outset and thoughtfully consider the views of
counsel on process issues that arise, arbitrators will find that parties welcome pro-active management by the neutral person(s) to whom they have entrusted the resolution of their dispute. With input from counsel, arbitrators must announce clear procedures and deadlines and must enforce them absent exceptional circumstances. In the commercial arbitration world of today, it is no longer up to arbitrators to decide whether to be pro-active or laissez faire. Thoughtful, well-informed and active management of the arbitration is now a critical part of the service parties are paying arbitrators to deliver. Just as Harry Truman reminded us that those who can't stand the heat should get out of the kitchen, those who are unwilling to devote serious attention to managing their cases should not serve as commercial arbitrators.

4. Conduct a thorough preliminary conference and issue comprehensive case management orders.

As early in the case as possible, arbitrators should conduct a thorough Preliminary Conference in the manner prescribed in Chapter 6 of The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration. Arbitrators should emphasize the importance of participation by senior client representatives of each party, in person or by phone, in this critical opportunity to develop a sensible and economical plan for the arbitration. Whenever feasible, the first conference should be conducted in-person, since that setting is more conducive than conference calls to fostering cordial and cooperative relations among parties and counsel. After the conference, arbitrators should issue a comprehensive "case management order" setting forth the procedures and schedule that will govern the arbitration. Arbitrators should only permit departures from those procedures and schedule for good cause shown (see Protocol for Outside Counsel, Actions 3, 4, 5).

Comments:

The single greatest tool for achieving a fair and efficient commercial arbitration is a well-conducted preliminary conference. It is the best opportunity for all participants to focus their attention and creativity on how to make the arbitration run smoothly and economically. It is also the ideal time for client representatives to appreciate how costly and protracted a "scorched earth" campaign will be and how much time and money can be saved by scaling back on discovery, motions and hearing time. That is why arbitrators should insist that senior client representatives (business executives or in-house counsel) attend the conference.

Because the preliminary conference is such a critical phase of the arbitration, it must not be given short shrift. Arbitrators should assure that lead counsel appear at the conference and that all parties have reserved ample time for careful consideration of all issues. If possible, the conference should be conducted in-person, which is more conducive to cooperation and mutual brainstorming than a conference call. Unless the amount at stake is quite modest, the increased productivity of an in-person conference is almost always worth the added expense.

A productive preliminary conference requires thorough preparation by all participants. Arbitrators should provide counsel with an agenda of matters to be taken up at the conference and should invite counsel to add to the list. Arbitrators should require counsel to discuss the agenda items in an effort to reach agreement on as many items as possible and provide to the
arbitrators, prior to the conference, a joint email setting forth the agreements they have reached and their respective positions on points of disagreement. How best to conduct a preliminary conference could be a course in itself. The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration devotes thirty single-spaced pages to the topic. While that discussion should be consulted in full, here is a summary checklist of the matters that ought to be determined at the preliminary conference:

- Identity of ALL parties to the arbitration (no *et al* descriptions).
- The specific claims, defenses and counterclaims (if any) to be decided. Are all stated with sufficient specificity?
- Under what arbitration agreement is the arbitration being conducted?
- What law governs the arbitration procedure?
- What law governs the merits of the claims and defenses?
- What rules will apply in the arbitration?
- Is there any dispute concerning the arbitrability of any claim or defense?
- Do the arbitrators need any additional information (e.g., names of testifying witnesses and key actors who may not testify) in order to make additional disclosures?
- Does any party seek to join additional parties? On what authority and basis?
- Does any party seek consolidation with another arbitration? On what authority and basis? Who is authorized to make the decision if a party is opposed to consolidation?
- What discovery (if any) will be permitted? What procedures will apply? (See Protocol for Arbitration Providers, Action 3.)
- What motions (if any) will be permitted? What procedures and time frames will apply? (See Protocol for Business Users and In-House Counsel, Action 9.)
- Does the arbitration involve specialized scientific or technical matters for which the arbitrators should have a "tutorial"? If so, can the parties agree on a treatise or other publication for the arbitrators to read, or neutral expert to teach the Panel?
- Would appointment of one or more neutral experts be appropriate?
- How will the parties submit documents and information to the arbitrators and to each other- email, fax, electronic filing, hand delivery?
- At what location(s) will the hearing be held?
- On what dates will the hearing be held?
- Do the parties need subpoenas for non-party witnesses? What authority to issue?
- Procedures and standards for seeking a continuance of the hearing.
- Procedures for the conduct of the hearing (see Action 9 below).
- Nature of the award (see Action 10 below).
- Due date of the award.

Following the preliminary conference, arbitrators should promptly issue a case management order that memorializes the determinations made on all the foregoing matters and any others addressed at the conference. If subsequent developments require some adjustments in that order, an amended case management order should be promptly be prepared and issued.
5. **Schedule consecutive hearing days.**

In order to avoid the delay and excess costs caused by having multiple hearing sessions, arbitrators should schedule the hearing on consecutive days whenever possible. Arbitrators should encourage the parties to make a realistic estimate of the number of hearing days they will need and should reserve a sufficient number of days for completing the hearing in the time allotted, even if unexpected developments, or unduly optimistic estimates, lead to a somewhat longer hearing than originally projected.

Comments:

Arbitration hearings that do not run on consecutive days involve much greater expense than those that do. Apart from the possibility of repetitive travel expenses, there is duplicative deployment, preparation and refreshing tasks for all participants and added work that people think to do in the time between sessions. Spreading the hearing out over a period of weeks or months obviously protracts the arbitration. Arbitrators should attempt to schedule consecutive hearing days whenever possible. Arbitrators should also be sure that a realistic number of days are reserved for the hearing. Counsel frequently underestimate, sometimes drastically, the amount of time they will take for examinations and arguments at the hearing. It is better to schedule an ample number of days and cancel those not needed than to schedule too few days and then have to find, on the calendars of busy lawyers and arbitrators, additional, mutually available time for completing the hearing.

6. **Streamline discovery; supervise pre-hearing activities.**

Arbitrators should make clear at the preliminary conference that discovery is ordinarily much more limited in arbitration than in litigation and should work with counsel in finding ways to limit or streamline discovery in a manner appropriate to the circumstances. Arbitrators should actively supervise the pre-hearing process. They should keep a close eye on the progress of discovery and other preparations for the hearing and should promptly resolve any problems that might disrupt the case schedule (usually through a conference call preceded by a jointly-prepared email outlining the nature of the parties' disagreements and each side's position with regard to the dispute, rather than formal written submissions) (see Protocol for Outside Counsel, Action 5).

Comments:

The necessity of containing discovery and multiple ways of doing so are thoroughly discussed in the Protocol for Arbitration Providers, Action 3. Such procedures are typically set at the preliminary conference and memorialized in the case management order. However, it is

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188. The AAA COMMERCIAL RULES provide that, “Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.” AAA COMMERCIAL RULES, supra note 160, at R. L-4(h).

189. When a hearing may require multiple weeks, it may be appropriate to have one week day off per week so that counsel and arbitrators can keep up with their other cases.
equally essential for arbitrators to monitor the parties' progress with discovery and other pre-hearing activities and to quickly step in if unexpected developments threaten to disrupt the schedule. Some arbitrators like to schedule periodic conference calls to check the status of pre-hearing activities. Others fear this may encourage counsel to pile up problems for the periodic calls rather than work them out themselves and thus instruct counsel to request a conference call promptly after serious, good faith efforts at resolution have failed. Whichever approach is taken, arbitrators need to "stay on top of the case" from preliminary conference to hearing to make sure that the parties' expectations about the length of the arbitration are met.\textsuperscript{190}

An excellent template for arbitrator control of discovery is provided by the New York State Bar Association Report on Arbitration Discovery and JAMS Recommended Arbitration Discovery Protocols based on the Report.\textsuperscript{191}

7. \textit{Discourage the filing of unproductive motions; limit motions for summary disposition to those that hold reasonable promise for streamlining or focusing the arbitration process, but act aggressively on those.}

Arbitrators should establish procedures to avoid the filing of unproductive and inappropriate motions. They should generally require that, before filing any motion, the moving party demonstrates, either in a short letter or a telephone conference, that the motion is likely to be granted and is likely to produce a net savings in arbitration time and/or costs.

Arbitrators should explain to parties that dispositive motions involving issues of fact are granted less frequently in arbitration than in litigation because there is no appellate court to reinstate the case if they erred in dismissing it. However, there are matters for which a dispositive motion, especially a motion for partial summary disposition, might provide an opportunity for shortening, streamlining or focusing the arbitration process—as, for example, where arbitrators are able to rule on a statute of limitations defense, determine whether a contract permits claims for certain kinds of damages, or construe a key contract provision. Thus, arbitrators should encourage parties to be judicious in filing motions but should be willing to entertain and rule on them in situations where the motion presents a realistic possibility of shortening, streamlining or focusing the arbitration process.

Comments:

After discovery, motions are probably the leading cause of excessive cost and delay in commercial arbitrations. Veteran litigators, acting largely out of habit, frequently file motions

\textsuperscript{190} The ICDR has established a voluntary set of guidelines designed to promote fair and expeditious arbitration proceedings by encouraging voluntary exchanges of the most material documents. \textit{See ICDR GUIDELINES, supra note 140.}

for summary disposition and other relief, which impose substantial burdens of briefing and argument on all counsel and intensive factual and legal review by arbitrators. While arbitrators certainly have the authority to grant such motions, the absence of appellate review typically and properly makes them quite cautious about doing so, especially when the other side has had little or no discovery. On the other hand, there are purely legal issues, such as statute of limitations, interpretation of a contract, or identifying the required elements of a cause of action, which arbitrators can and should undertake to decide early in a case, particularly when a decision in favor of the movants could substantially reduce transaction time and cost for both sides. Arbitrators need to educate counsel on which sorts of motions are likely to be productive in arbitration and which are not and then establish procedures for processing the former quickly and efficiently.192

8. Be readily available to counsel.

Arbitrators should recognize that their acceptance of an arbitral appointment carries with it an obligation to be reasonably available to the parties to resolve procedural, process or scheduling disputes that could delay the timely resolution of the case. Thus, they should be willing on fairly short notice (generally not more than two or three business days) to hold a conference call with the parties in order to resolve such matters.

In litigation, parties sometimes wait months to present an issue to a judge or to receive the judge’s decision; often the case is at a near standstill until the issue is resolved. Arbitration parties can escape these long delays, but only if arbitrators are prepared to hear their arguments promptly and issue prompt decisions. Arbitrators who are committed to speed and economy in commercial arbitration must encourage counsel to consult them quickly when obstacles to schedule compliance arise, must be willing to convene a conference call within a few days of such a contact, and must be able to rule either at the end of the call or very shortly thereafter.

9. Conduct fair but expeditious hearings.

Arbitrators should conduct hearings in a manner that is both fair and expeditious as described in detail in Chapter 9 of The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.

192 For example, arbitrators may provide in their case management order that (1) prior to filing any dispositive motion, the moving party must provide the arbitrator with a letter of not more than five pages explaining why the motion is ripe, likely to be granted, and likely to save time and money in the arbitration; (2) the opposing party may have five days to respond with a five page letter; and (3) the arbitrator will promptly decide whether to entertain the motion. If he or she does so, the arbitrator may set an expedited briefing schedule and page limits on the briefs. After receiving the briefs, the arbitrator may deny the motion without argument or schedule a prompt oral argument (perhaps by phone) and then rule. See generally CCA GUIDE TO BEST PRACTICES, supra note 84.
Comments:

Every day of a hearing, in which one or more lawyers, paralegals, client representatives and witnesses are in attendance, having prepared hours for that day's events, typically costs a client many thousands of dollars. While it is certainly important that the proceedings be fair and contribute to a sound result, it is also important that the proceedings be efficient and respectful of the parties' time and money. Conducting a fair but efficient hearing is almost entirely in the hands of the arbitrators and is the best hallmark of a truly accomplished commercial arbitrator. Chapter 9 of The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration provides 45 pages of guidance on how to accomplish that goal and should be reviewed in detail. Major steps toward an efficient arbitration hearing include the following:

- Make clear to counsel that, unless formal rules of evidence apply (which is rare in arbitration), virtually all non-privileged evidence offered by any party will be received and traditional objections (hearsay, foundation, etc.) will not be entertained. Urge counsel to focus on the probativeness of evidence, not its admissibility.
- Determine what order of proof is most appropriate for the particular case, including sequencing the hearing in progressive phases, taking both sides' witnesses issue by issue, or ruling on threshold issues before receiving evidence on other issues.
- Encourage the parties to submit a joint collection of core exhibits in chronological order with key portions highlighted.
- Establish an expedited procedure for receipt of other exhibits. For example, require all parties to submit their tabbed, index exhibits in advance of the hearing and advise counsel that all such exhibits will be received en masse at the start of the hearing save for any that are privileged or genuinely challenged as to authenticity.
- Require that parties show demonstrative exhibits, including power point slides, to each other a reasonable time before they are used in the hearing so that time is not wasted in assessing and possibly challenging their accuracy.
- Discuss with counsel the possible use of written direct testimony for some or all witnesses.
- Establish procedures to narrow and highlight the matters on which opposing experts disagree. For example, require experts to confer before hearing and provide the arbitrators with a list of the points on which they agree, the points on which they disagree, and a summary statement of their respective opinions on the latter.
- Limit the presentation of duplicative or cumulative testimony.
- Make appropriate arrangements for receiving by conference call or otherwise testimony from witnesses in remote locations.
- Consider receiving affidavits or pre-recorded testimony regarding less critical matters.
- Sequester witnesses until they testify unless all parties request otherwise.
- Establish and maintain a realistic daily schedule for the hearing. Start hearings on time and don't allow excessive recesses and lunch breaks.
• Encourage the parties to employ a “chess clock” that limits the total number of ours available to counsel for examination and argumentation.
• At the close of each hearing day (NOT the beginning), discuss with counsel any administrative matters that need attention and monitor their progress against the projected hearing schedule. If needed to meet the scheduled completion date, consider starting hearings earlier, ending them later, or having one or more weekend sessions.
• Don't hesitate to tell counsel when a point has been understood and they may move on, or when a point was not understood and requires clarification.
• Make sure, well prior to the hearing, that counsel have worked out all logistical arrangements concerning transcripts, shared use of power point or other equipment, etc.
• Freely take witnesses out of turn when necessary to accommodate scheduling conflicts.
• Prohibit parties from running out of witnesses on any given day. "Call your next witness" is a powerful tool for keeping a hearing moving.193

Through these and similar techniques practiced by experienced arbitrators, commercial arbitration hearings can be conducted both fairly and efficiently.

10. Issue timely and careful awards.

Arbitrators should issue carefully crafted awards that meet the parties' needs in terms of format, level of detail, and timing, and that are unlikely to lead to additional cost and delay due to vacatur and further proceedings. See Chapter 11 of The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.

Comments:
Arbitration award are of multiple types (e.g., interim awards, partial final awards, and final awards) and multiple forms (e.g., bare awards, reasoned awards, awards with findings of fact and conclusions of law). There are pros and cons to each form and type. See generally Chapter 11 of The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.194 Arbitrators should explain these considerations to the parties and ascertain what sort of award they want. Arbitrators should then exercise maximum care and judgment in crafting such an award and issuing it within any applicable time limit. Vacatur proceedings can add substantially to the cost and length of an arbitration; arbitrators thus have a duty to the parties to render awards that are as "vacatur-proof" as possible.

193 Id. at Ch. 9.
194 Id. at Ch. 11.
Appendices

Appendix A: Bibliography/Helpful Sources

Helpful General Sources


Excellent, current guidance for commercial arbitrators on all aspects of the process, including management of hearings, control of discovery, etc.

COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS (Thomas J. Stipanowich & Peter H. Kaskell, eds. 2001).

Book-length report by national commission of arbitrators and advocates offering guidance on all aspects of commercial arbitration (from drafting to award and appeal) for business users and counsel.


Excellent ICC report addressing approaches to controlling cost and delay in international arbitration.


Guidelines for corporate counsel seeking efficiency and economy in arbitration, with extensive references to current rules and emerging standards.


Short piece identifying several keys to improving economy and efficiency in commercial arbitration.


Article recommending steps for in-house counsel to take before and during arbitration.
Drafting Guidelines


Useful summary of topics to consider when drafting, adoption or recommending a dispute resolution clause.


Succinct, useful discussion of key drafting issues for commercial arbitration provisions.


Thoughtful treatment of stepped provisions for commercial contracts.

Discovery and Information Exchange Guidelines and Protocols


Short, succinct guidance for information exchange in international arbitrations under ICDR Rules.


JAMS’ adaptation of the NYSBA Report (see below).


Extensive, thoughtful guidance for arbitrators in managing discovery in commercial arbitration.


Comparison of two similar construction disputes that reached comparable outcomes through litigation and arbitration respectively; the arbitration proceeding is significantly more efficient as a result of skilled arbitrator case management.


Discussions of an arbitrator's power to order sanctions against parties for discovery abuse.

**E-discovery**


Extensive, seminal discussion of e-discovery issues.


Short discussion of key challenges facing arbitrators and counsel.

**Accelerated, Streamlined or Fast Track Procedures**


Example of innovative methods of e-filing, service, searching and monitoring.


Analysis of one company's aggressively streamlined arbitration process, including setting time limits, requiring single arbitrators, and eliminating discovery.


Corporate counsels' view of the need for expedited arbitration procedures.

### Appellate Arbitration Procedures


### Feedback Systems


Treatment of the value of feedback systems to structuring dispute resolutions systems and refining ongoing disputes.
## Appendix B: Summit Sponsors

**American Arbitration Association**  
**American Bar Association Section of Dispute Resolution**  
**The Chartered Institute of Arbitrators**  
**CPR Institute for Conflict Prevention and Resolution**  
**JAMS The Resolution Experts**  
**Straus Institute for Dispute Resolution, Pepperdine University School of Law**

The following Fellows of the College of Commercial Arbitrators:

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### Appendix C: Members of the Summit Planning Committee

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*Committee Co-Chairs
## Appendix D: Members of the Summit Task Forces

(All task force members participated as individuals and not as representatives of their firms.)

### Corporate Counsel Task Force

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Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*


In every arbitration, a key issue the parties and their counsel—as well as the arbitral tribunal—must face is the determination of the procedures for that arbitration. The principal institutional and ad hoc rules provide the framework for the arbitration and add detailed provisions concerning matters such as initial statements of the case, appointment of arbitrators and challenges, and the nature of the award and costs—but they are purposely silent about how evidence should be gathered and presented in any arbitration pursuant to those rules.

Quite properly, the principal institutional and ad hoc rules do not require that every arbitration be conducted in the same manner and so allow parties flexibility in devising the procedures best suited for each arbitration. Party autonomy and flexibility are among the significant advantages of international arbitration.

However, in many cases this intentional gap in the rules can cause problems if the parties have conflicting views as to how the case should proceed. This is particularly so when the parties come from different legal backgrounds and cultures. Problems can also occur when one or both of the parties are inexperienced in international arbitration.

Some three decades ago, the International Bar Association set out to assist parties by providing a mechanism to fill in the gap. The IBA is uniquely suited to provide such guidance, as its

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* This article is a revised and expanded version of the commentary to the previous text of the IBA Rules, "Commentary on the New IBA Rules of Evidence in International Commercial Arbitration", published in 2 B.L.I., pp. 16-36 (2000).

1 The IBA Rules on the Taking of Evidence in International Commercial Arbitration were drafted by a Working Party appointed by the Committee on Arbitration and ADR of the International Bar Association (Committee D). The Working Party was led by Giovanni Ughi of Italy, and its members were Hans Bagner, Sweden; John Beechey, England; Jacques Buhart, France; Peter Caldwell, Hong Kong; Bernardo M. Cremades, Spain; Otto De Witt Wijnen, The Netherlands; Emmanuel Gaillard, France; Paul A. Gélinas, France; Pierre A. Karrer, Switzerland; Wolfgang Kühn, Germany (former Chair of Committee D); Jan Paulsson, France; Hilmar Raeschke-Kessler, Germany; David W. Rivkin, United States (Chairman of Committee D); Hans van Houtte, Belgium; and Johnny Veeder, England.

2 On 29 May 2010, the IBA Council approved the revised version of the IBA Rules on the Taking of Evidence in International Arbitration. In 2008, the Arbitration Committee of the International Bar Association tasked the IBA Rules of Evidence Review Subcommittee with the review of the 1999 IBA Rules. The Subcommittee was led by Richard Kreindler of United States/Germany, and its members were David Arias, Spain; C. Mark Baker, United States; Pierre Bienvenu, Canada (former co-chair of the Arbitration Committee); Antonias Dimolitsa, Greece; Paul Friedland, United States; Nicolás Gamboa, Colombia; Judith Gill, Q.C., United Kingdom (co-chair of the Arbitration Committee); Peter Heckel, Germany; Stephen Jagusch, New Zealand; Xiang Ji, China; Kap-You (Kevin) Kim, Korea; Amy Cohen Kläsener, Review Subcommittee Secretary, United States/Germany; Toby T. Landau, Q.C., United Kingdom; Alexis Mourgue, France; Hilmar Raeschke-Kessler, Germany; David W. Rivkin, (former chair of the Arbitration Committee and of the Legal Practice Division), United States; Georg von Segesser, Switzerland; Essam al Tamimi, United Arab Emirates; Guido S. Tawil, Argentina (co-chair of the Arbitration Committee); Hiroyuki Tetzuka, Japan; Ariel Ye, China.
Arbitration Committee now has more than 2,500 arbitration practitioners from 90 countries around the world.

In 1983, the IBA adopted the *Supplementary Rules Governing the Presentation of Evidence in International Commercial Arbitration* (the "1983 Rules"). The 1983 Rules were generally well received and were frequently discussed at arbitration conferences as an example of the harmonisation procedures that can occur in international arbitrations.

By 1999, the nature of international arbitration had changed significantly. New procedures had developed; different norms as to appropriate procedures had taken root; and the scope of international arbitration had grown considerably, as many regions of the world formerly inhospitable to international arbitration embraced it.

As a result, the 1983 Rules needed to be updated and revised, and in 1997 Committee D of the IBA (now called the "Arbitration Committee") formed a new Working Party, chaired by Giovanni Ughi of Italy, to do this. The Working Party consisted of 16 members (see fn 1). It held many meetings and discussed the Rules at public meetings of the IBA in Delhi in November 1997 and in Vancouver in September 1998. Drafts were also circulated for public comment to Committee D members and others, and were discussed at numerous arbitration conferences. The Working Party considered comments received throughout this process in drafting the final IBA Rules on the Taking of Evidence in International Commercial Arbitration, which were adopted by the IBA Council on 1 June 1999 (also referred to herein as the "previous text of the IBA Rules").

The IBA Rules on the Taking of Evidence in International Commercial Arbitration were well received as a useful harmonisation of the procedures commonly used in international arbitration and were widely used in international arbitrations. In 2008, the IBA's Arbitration Committee (formerly called "Committee D") established the IBA Rules of Evidence Review Subcommittee and tasked it to review and, as needed, update the 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration. It held many meetings and discussed the Rules at open fora of the IBA in Buenos Aires in October 2008, in Dubai in February 2009, and in Madrid in October 2009. It conducted an online survey of Arbitration Committee members and others in 2008. In early 2010, the Arbitration Committee circulated a draft for public comment. The contemplated revisions were discussed at numerous arbitration conferences, and the comments received were duly considered throughout this process. The revised IBA Rules on the Taking of Evidence in International Arbitration were adopted by the IBA Council on 29 May 2010 (referred to herein as the "IBA Rules of Evidence" or the "revised IBA Rules of Evidence").

The resulting text of the 2010 revised IBA Rules of Evidence reflects the Arbitration Committee's wish to change and update only as necessary to reflect new developments and best practices in international arbitration since 1999. Users of the IBA Rules of Evidence will recognise the same structure, mechanisms and successful balance in the 2010 revised text of the IBA Rules of Evidence. The word "commercial" was deleted from the title of the Rules to acknowledge the fact that the IBA Rules of Evidence may be and are used both in commercial and investment arbitration.
The IBA Rules of Evidence contain procedures initially developed in civil law systems, in common law systems and even in international arbitration processes themselves. Designed to assist parties in determining what procedures to use in their particular case, they present some (but not all) of the methods for conducting international arbitration proceedings. Parties and arbitral tribunals may adopt the IBA Rules of Evidence in whole or in part—at the time of drafting the arbitration clause in a contract or once an arbitration commences—or they may use them as guidelines. Parties are free to adapt them to the particular circumstances of each matter.

This article describes the essential provisions of the IBA Rules, as revised in 2010, and provides some background on their drafting and the revision process. The Working Party and IBA Rules of Evidence Subcommittee hope this commentary will be helpful to parties in determining whether or not to use the IBA Rules of Evidence and how best to apply them in their particular arbitration. The IBA Rules of Evidence and translations of the Rules into various languages are available for download at www.ibanet.org.

Preamble

It was considered important to identify certain general principles which governed the IBA Rules of Evidence, so that parties and arbitral tribunals could best understand how to apply them. The Preamble is also important in illustrating both what the IBA Rules of Evidence hope to accomplish and what they do not intend to do.

i. The Preamble notes that the IBA Rules of Evidence are "designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration". The IBA Rules of Evidence are not intended to provide a complete mechanism for the conduct of an international arbitration (whether commercial or investment). Parties must still select a set of institutional or ad hoc rules, such as those of the ICC, AAA, LCIA, UNCITRAL or ICSID, or design their own rules, to establish the overall procedural framework for their arbitration. The IBA Rules of Evidence fill in gaps intentionally left in those procedural framework rules with respect to the taking of evidence.

ii. As the very first sentence of the Preamble notes, the IBA Rules of Evidence are intended to provide an "efficient, economical and fair process" for the taking of evidence in international arbitration. This principle informs all of the IBA Rules of Evidence. The Working Party considered that as international arbitration grows more complex and the size of cases increases, it is important for parties and arbitral tribunals to find methods to resolve their disputes in the most effective and least costly manner. The Review Subcommittee revised this sentence to include expressly the principle of fairness. This change goes hand in hand with the revision to paragraph 3 of the Preamble, which now includes a requirement that each Party shall act "in good faith" in the taking of evidence pursuant to the IBA Rules. At the discretion of the arbitral tribunal, violation of the good faith requirement can result in the consequences set forth in Articles 9.5, 9.6 and 9.7.

iii. It was recognised that there is not a single best way to conduct all international arbitrations, and that the flexibility inherent in international arbitration procedures is an advantage. Therefore, it was considered important to note specifically, in paragraph 2 of
the Preamble, that the IBA Rules of Evidence are not intended to limit this flexibility. Indeed, as noted in that paragraph, the IBA Rules of Evidence should be used by parties and arbitral tribunals in the manner that best suits them.

iv. The Preamble notes the overriding principle of the IBA Rules of Evidence that the taking of evidence shall be conducted on the principle that each party shall be "entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely". This principle infuses all of the provisions of the IBA Rules of Evidence. Accordingly, the provisions for the exchange of documentary evidence, witness statements, and expert reports, among others, provide each party and the arbitral tribunal with significant information about each side’s evidence.

Definitions

The Definitions section of the IBA Rules of Evidence (no longer a numbered Article) sets forth basic definitions to be applied in the IBA Rules of Evidence. The definitions are generally straightforward, with commonly understood meanings. The definitions themselves do not provide any substantive rules of conduct or evidence.

One definition that is not so commonly used is that for "General Rules". This term refers in the IBA Rules of Evidence to the institutional or ad hoc rules according to which the parties are conducting their arbitration, such as those of the ICC, AAA, LCIA, UNCITRAL and ICSID. The term is used in Articles 1.3 and 1.5, which discuss among other things conflicts between the IBA Rules of Evidence and other rules that govern the arbitration proceeding.

The definition of "Document" in the previous text of the IBA Rules was broad enough to include most forms of electronic evidence. The Review Subcommittee introduced minor changes intended to ensure that all forms of evidence, including electronic evidence, are subject to the IBA Rules and may be requested, subject to (i) the requirements of Article 3.3, including satisfaction of the relevance and materiality standard, and (ii) the reasons for objection set forth in Article 9.

Article 1 —Scope of Application

International arbitrations are subject to general rules establishing the procedural framework for the arbitration and to mandatory law relating to arbitration procedure at the seat of the arbitration. Therefore, while the IBA Rules of Evidence have been drafted to conform with the principal institutional and ad hoc rules generally used by parties, conflicts may nevertheless arise with the other set of rules chosen by the parties (the "General Rules" in the parlance of the IBA Rules of Evidence) or any mandatory legal provisions. Article 1 (formerly Article 2) sets forth several basic principles as to how arbitral tribunals should apply the IBA Rules of Evidence in the event of a conflict with any of these other provisions:

1. In a conflict between the IBA Rules of Evidence and mandatory legal provisions, the mandatory legal provisions shall govern.
2. In a conflict between the IBA Rules of Evidence and the General Rules (i.e., the institutional or ad hoc rules chosen by the parties), the parties have a right, in keeping with the principle of party autonomy which is central to any international arbitration, to resolve this conflict in the manner they choose, as long as both parties agree. In the absence of such agreement, the arbitral tribunal shall try to harmonise the two sets of rules to the greatest extent possible.

3. If a conflict exists regarding the meaning of the IBA Rules of Evidence, or if both the IBA Rules of Evidence and the General Rules are silent on a particular issue, then the IBA Rules of Evidence instruct the arbitral tribunal to apply the general principles of the IBA Rules of Evidence, such as those set forth in the Preamble, to the greatest extent possible.

As mentioned above, the IBA Rules may be used in commercial or investment arbitration. However, the IBA Rules do not contain any specialised rules for investment arbitrations such as rules pertaining to the participation of amici curiae.

Article 1.2 provides that parties who have agreed to the application of the IBA Rules prior to 29 May 2010, the date of adoption of the 2010 revisions, shall be deemed to have agreed to the previous version of the IBA Rules in the absence of a contrary indication. As the IBA Rules could be potentially subject to further updates, parties wishing to apply the version of the IBA Rules current at the time of the arbitration should consider including this in the arbitration clause (see suggested arbitration clause in the Foreword to the IBA Rules).

Article 2 —Consultation on Evidentiary Issues

The 2010 revisions include the addition of a new Article 2. The Subcommittee carefully considered whether and how the IBA Rules should be adapted or expanded in response to the increased size and complexity of arbitrations and the evidentiary issues associated with them. After review of various sets of domestic and international arbitration rules and procedures, the Subcommittee agreed on a "meet and consult" approach.

Article 2.1 provides for a mandatory consultation between the arbitral tribunal and the parties "at the earliest appropriate time in the proceedings". Under normal circumstances, this consultation would coincide with a procedural conference or exchange of views early in the proceedings. Early timing allows the participants to organise the taking of evidence in an efficient, economical and fair manner. Where the evidentiary issues are not considered to be sufficiently clear at an early stage in the arbitration, the arbitral tribunal might postpone such conference or exchange.

The issues which may be appropriate for discussion at the Article 2.1 consultation include, but are not limited to, those enumerated in Article 2.2. While Article 2 provides a framework for discussing evidentiary issues, it is not intended to prescribe how evidence should be taken in any particular arbitration. For example, in any given arbitration the arbitral tribunal and the parties may determine not to require disclosure of electronic evidence. On the other hand, if they determine that taking evidence in electronic form would be conducive to the efficient, economical and fair taking of evidence, it may be advisable to discuss the related details at an early stage, such as the form of production (Article 3.12(b)) and the formulating of requests to
produce by identifying specific files, search terms, individuals or other means for searching for
documents in an efficient and economical manner (Article 3.3(a)(ii)).

Article 2.2(e) encourages discussion of means to save time and costs in the arbitration. It also
refers to the conservation of resources in connection of the taking of evidence, which could
include, by way of example, the economic and environmental costs of travel or document
reproduction (including by submitting documents using web-based platforms such as NetCase,
the platform of the ICC).

Article 2.3 (formerly paragraph 3 of the Preamble) encourages arbitral tribunals to identify to the
parties, as early as possible, the issues that they may regard as relevant to the case and material to
its outcome. That paragraph also notes that a preliminary determination of certain issues may be
appropriate. While the Working Party did not want to encourage litigation-style motion practice,
the Working Party recognised that in some cases certain issues may resolve all or part of a case.
In such circumstances, the IBA Rules of Evidence make clear that the arbitral tribunal has the
authority to address such matters first, so as to avoid potentially unnecessary work.

Article 3 — Production of Documents

Article 3 deals with documents that the parties wish to introduce as evidence into the arbitral
proceedings.

Article 3 refers to three groups of documents: (1) documents that are at the party’s own disposal;
(2) documents that the party wants to use as evidence for its submissions but cannot produce on
its own, because they are either in the possession of the other party in the arbitral proceedings or
in the possession of a third party outside of the arbitration; and (3) documents that neither party
has introduced or wants to introduce as evidence into the arbitral proceedings, but which are seen
as relevant and material by the arbitral tribunal. In addition, Article 3 contains several general
principles for the treatment of documents as evidence by the parties and by the arbitral tribunal.

Production of Documents Available to One Party

The IBA Rules of Evidence begin with the principle that each party shall introduce those
documents available to it and on which it wants to rely as evidence. This provision reflects the
principle, generally accepted in both civil law and common law countries, that parties have a
burden to come forward with the evidence that supports their case.

Article 3.1 contains the phrase "within the time ordered by the arbitral tribunal". This phrase is
repeated throughout the IBA Rules of Evidence when a submission is to be made or an action to
be taken by the parties. The Working Party believed that the best course is to maintain
maximum schedule flexibility for the parties and arbitral tribunals. Therefore, throughout the
IBA Rules of Evidence, as here, time frames are left to be determined by the arbitral tribunal in
each case, presumably in consultation with the parties. For example, with respect to the initial

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3 See UNCITRAL Model Law, Article 23; HKIAC Rules, Article 23.2; ICC Rules, Article 20(2); ICDR Arbitration
Rules, Article 19.2; ICSID Arbitration Rules, Rule 33; LCIA Rules, Article 15.6; SCC Arbitration Rules, Article
26(2); WIPO Arbitration Rules, Articles 35-36.
production of documents on which each party intends to rely, the specific time when such documents are to be submitted may vary depending upon how well framed are the issues in the initial pleadings. Time frames will also, of course, vary depending upon the complexity of the matter, the resources and locations of the parties and the particular circumstances of each case.

Following such an initial production of documents on which each party intends to rely, later submissions in the case, such as witness statements or expert reports, may make it necessary for parties to submit additional documents to rebut statements contained in such submissions. Article 3.11 (formerly Article 3.10) provides for such a second round of submission of documents within each party’s possession. Again, the arbitral tribunal is to determine when such a second round of production may take place.

**Documents in the Possession of an Opposing Party**

The issue of whether and under what conditions one party should be able to request production of documents from another party occupied much of the Working Party’s discussions in 1999. The vigour with which this issue was debated demonstrated that the question of document production was the key area in which practitioners from common law countries and civil law countries differ. The debate produced a balanced approach that became a central aspect of the IBA Rules of Evidence and has become widely accepted by both common law and civil law practitioners. The current revision of the IBA Rules of Evidence preserves this balance.

**Principles**

The Working Party was able to reach agreement on certain principles governing document production because practices in international arbitration can be, and have been, harmonised to a large extent. The Working Party was guided by several principles:

1. Expansive American- or English-style discovery is generally inappropriate in international arbitration. Rather, requests for documents to be produced should be carefully tailored to issues that are relevant and material to the determination of the case.

2. At the same time, however, it was believed that there is a general consensus, even among practitioners from civil law countries, that some level of document production is appropriate in international arbitration. According to some of the most frequently used general rules, arbitral tribunals are to establish the facts of the case "by all appropriate means". This includes the competence of the arbitral tribunal to order one party to introduce certain documents, including internal documents, into the arbitral proceedings upon request of the other party. Even in some civil law countries, a State court is entitled to order the production of internal documents, either upon request of one party or because it sees the need for these documents itself.

3. The revised text of the IBA Rules provides that requests to produce are to be directed both to the arbitral tribunal and to the other parties. In the first instance, a party is to produce all documents requested in its possession, custody or control as to

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4 *E.g.,* ICC Rules, Article 20(1); LCIA Rules, Article 22.1(c).
which it makes no objection (Article 3.4). However, the decision on the scope of
document production—whether or not a party must introduce internal documents into the
arbitral proceedings against its will—shall lie solely with the arbitral tribunal. Therefore,
only the arbitral tribunal has the competence to make a decision on the request if the
receiving party refuses to produce the requested documents voluntarily.

4. The scope of the permissible document request is also limited by certain
objections described in Article 9.2 (see the discussion of these objections below) or the
failure to satisfy the requirements set forth in Article 3.3. A party may raise any of the
reasons for objection in opposing the document request. If it does so, the arbitral tribunal
may first invite the relevant parties to consult with each other with a view to resolving the
objection (Article 3.6).

5. If the objection is not resolved by means of such consultation, either party
may request the arbitral tribunal to make a decision as to whether or not any of these
objections apply as well as a decision on the propriety of the request for production itself
(Article 3.7, formerly Article 3.6). The arbitral tribunal shall order the production if it is
convinced, first, that the issues that the requesting party wishes to prove are relevant to
the case and material to its outcome; second, that none of the reasons for objection set
forth in Article 9.2 applies; and, third, that the requirements of Article 3.3 have been
satisfied.

The rules set forth in Articles 3.2 – 3.8 follow from the principles described above. These rules
concerning requests for production of documents from other parties represent a balanced
compromise between the broader view generally taken in common law countries and the more
narrow view generally held in civil law countries. The IBA Rules of Evidence may be
particularly useful, therefore, when an arbitration involves parties coming from these different
legal backgrounds. A Continental European party may, for example, find that these Rules are
useful in seeking to restrict an overly broad request from a common law party, while a common
lawyer may be able to use the IBA Rules of Evidence to obtain documents from a Continental
European party that the latter may not otherwise wish to provide.

**Procedures**

Usually following the initial submission of documents on which each party intends to rely
pursuant to Article 3.1, any party may submit a request to produce documents to the arbitral
tribunal and the other parties. This request must be submitted within the time ordered by the
arbitral tribunal, as provided in Article 3.2. Article 3.3 provides certain requirements regarding
the content of a request to produce, which are generally designed to have the request specifically
describe the documents being sought. Article 3.3 is designed to prevent a broad "fishing
expedition", while at the same time permitting parties to request documents that can be identified
with reasonable specificity and which can be shown to be relevant to the case and material to its
outcome. This specificity of the information required by Article 3.3 is also designed to help the
receiving party decide whether it wants to comply with the request voluntarily (as provided in
Article 3.4), or if it wants to raise objections (Article 3.5). The specificity of the request is also
designed to make it possible for the arbitral tribunal to decide, if there is an objection to the
request to produce, whether or not to grant the request pursuant to the standards set forth in Article 3.7.

The request to produce must (i) identify the document or documents sought, described in sufficient detail; (ii) state why the documents requested are relevant to the case and material to its outcome; and (iii) state that the documents requested are not in the possession of the requesting party (with one exception) and the reasons why that party assumes the documents requested to be in the possession of the other party. In a compromise between the common law and civil law systems, the request to produce can identify documents either by describing an individual document (Article 3.3(a)(i)) or by describing "in sufficient detail (including subject-matter) … a narrow and specific requested category of Documents that are reasonably believed to exist" (Article 3.3(a)(ii)). The description of an individual document is reasonably straightforward. The IBA Rules of Evidence simply require that the description be "sufficient to identify" the document.

Permitting parties to ask for documents by category, however, prompted more discussion. The Working Party and the Subcommittee did not want to open the door to "fishing expeditions". However, it was understood that some documents would be relevant and material and properly produced to the other side, but that they may not be capable of specific identification. Indeed, all members of the Working Party and of the Subcommittee, from common law and civil law countries alike, recognised that arbitrators would generally accept such requests if they were carefully tailored to produce relevant and material documents. For example, if an arbitration involves the termination by one party of a joint venture agreement, the other party may know that the notice of the termination was given on a certain date, that the Board of the other party must have made the decision to terminate at a meeting shortly before that notice, that certain documents must have been prepared for the Board’s consideration of that decision and that minutes must have been taken concerning the decision. The requesting party cannot identify the dates or the authors of such documents, but nevertheless can identify with some particularity the nature of the documents sought and the general time frame in which they would have been prepared. Such a request may qualify as a "narrow and specific category of Documents", as permitted under Article 3.3(a)(ii).

As documents in electronic form have become more important in international commerce and hence in dispute resolution, and since their production may be burdensome to the requesting party, the Subcommittee introduced in Article 3.3(a)(ii) the means for parties to identify more precisely a narrow and specific requested category of documents maintained in electronic form. Either at a party’s own behest or upon order of the arbitral tribunal, electronic documents may additionally be identified by file name, specified search terms, individuals (for example, specific custodians or authors) or other means of searching for such documents in an efficient and economic manner (Article 3.3(a)(ii)). The revised Rules are neutral regarding whether electronic documents should be produced in any given arbitration; they simply provide a framework for doing so where the parties agree or the arbitral tribunal orders production of such documents.

As noted above, the provisions of Articles 3.3(b) and (c) also serve as checks on the scope of any request to produce. The content of the requested document needs to relate to issues in the case, and the relationship between the documents and the issues must be set forth with sufficient specificity so that the arbitral tribunal can understand the purpose for which the requesting party
needs the requested documents. By requiring the requesting party to state that the documents sought are not in its own possession, the IBA Rules of Evidence seek to prevent unnecessary harassment of the opposing party by the requesting party. Article 3.3(c)(i) of the revised IBA Rules recognises one exception to this principle. In the age of electronic documents, it will become increasingly less likely that a particular document has been entirely deleted from a party’s records, as it may continue to exist electronically, such as on back-up tapes or in electronic archives. Where a document is no longer easily accessible, for example because it is not in a server's active data, it may be less burdensome and costly for another party to produce it.

Under the previous text of the IBA Rules, documents produced pursuant to a request to produce were to be sent not only to the other parties in the arbitration but also to the arbitral tribunal. The rationale had been that because any documents produced would automatically become a part of the record, the self-interest of parties should cause them thereby to limit the scope of their request. This rule was revised in 2010 in light of the observation that it is often not efficient for arbitrators to review all of the documents at the stage of their production. Accordingly, the default has been changed such that documents are to be produced to the other parties and only to the arbitral tribunal if it so requests.

The specificity required in the request to produce makes it likely that such a request will be made only after the issues have become sufficiently clear in the case. The precise timing of such a request will be determined by the arbitral tribunal. It will naturally depend upon the specificity of the initial pleadings and any Terms of Reference or other documents identifying the issues.

A party seeking to oppose entirely or to limit a request to produce must raise its objections in writing within the time ordered by the arbitral tribunal. As noted, the reasons for objection shall be those set forth in Article 9.2 of the IBA Rules of Evidence (discussed below) or a failure to satisfy any of the requirements of Article 3.3. If a party raises such objections, the arbitral tribunal must decide on the propriety of the request to produce. The revised text of the IBA Rules provides that the arbitral tribunal may, before making such decision, give the parties an opportunity to consult with each other with a view to resolving the objection themselves (Article 3.6). Party-to-party consultation may in some circumstances be the more effective means of resolving objections, including those based on insufficient descriptions and other deficiencies in the form of the request to produce.

If the arbitral tribunal deems such consultation to be unnecessary or if it takes place but objections remain following it, the arbitral tribunal shall consult the parties regarding the request to produce and the objections, and shall "in timely fashion" decide whether to accept some or all of the objections. The arbitral tribunal may order production of the documents sought in the request to produce only if it is convinced that (i) "the issues that the requesting party wishes to prove are relevant to the case and material to its outcome", (ii) "none of the reasons for objection set forth in Article 9.2 applies" and (iii) "the requirements of Article 3.3 have been satisfied". This third requirement was added in the 2010 revision.

Occasionally, an objection—such as on the grounds of privilege, commercial confidentiality or special political or institutional sensitivity (see Article 9.2(b), (e) and (f)—may require the arbitral tribunal first to review the document itself without review by the requesting party. It is generally preferable that the arbitral tribunal not review any such documents itself because (i) if
after reviewing the document the arbitral tribunal upholds the objection, it could not eliminate its knowledge of the document once it had been reviewed, or (ii) there may be confidentiality concerns. For such cases, Article 3.8 (formerly Article 3.7) provides that in such "exceptional circumstances", when the arbitral tribunal determines that it should not review the document, it may appoint an independent and impartial expert, who is bound to confidentiality, to review any such document and report on the objection. In other circumstances, such as where time and cost factors are considered to be compelling, the arbitral tribunal may, nonetheless, decide to review the document itself.

The expert, who need not necessarily be appointed pursuant to the terms of Article 6 of the IBA Rules of Evidence, would provide a report on the objection, but the arbitral tribunal is to make the final ruling as to its validity. If the objection is upheld, then the document is to be returned by the expert to the producing party, and it does not become a part of the arbitral proceedings. If, on the other hand, the objection is denied, then the requested party should produce the document to the other parties pursuant to the request to produce. In either event, the expert would, of course, also keep confidential the information learned in reviewing the document.

**Requests to Produce by the Arbitral Tribunal**

The IBA Rules of Evidence also permit the arbitral tribunal to seek certain documents that it considers to be relevant to the case and material to its outcome or to allow or request parties to use their best efforts to obtain them.

First, a party may request production of documents from a person or organisation that is not a party to the arbitration. Some arbitration laws permit arbitral tribunals to take or to apply for certain steps, such as a subpoena, to obtain documents from non-parties. Therefore, Article 3.9 (formerly Article 3.8) permits parties to ask an arbitral tribunal "to take whatever steps are legally available to obtain the requested Documents, or seek leave from the arbitral tribunal to take such steps itself", as long as the arbitral tribunal determines that such documents would be "relevant to the case and material to its outcome", the requirements of Article 3.3 have been satisfied and none of the reasons for objection set forth in Article 9.2 applies.

In addition, since the arbitral tribunal may be required under certain arbitral rules to establish the facts of the case by all appropriate means, it should be entitled to order a party to produce documents so far not introduced as evidence into the proceedings (see Article 3.10, formerly Article 3.9) or to request any party to use its best efforts to take, or itself take, any step that it considers appropriate to obtain documents from any person or organisation. Ultimate oversight and control over this process should remain with the arbitral tribunal. However, there may be circumstances under which a party is better positioned to undertake such steps, including, for example, due to presence in the country in question. A party receiving such a request from an arbitral tribunal, however, has the same right to raise objections, pursuant to Article 9.2, as if the documents had been sought in a request to produce by another party. If such objections are raised, the arbitral tribunal makes a decision based upon the considerations described above.

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5 ICC Rules, Article 20(1); LCIA Rules, Article 22.1(c).
General Issues Regarding Documents

Copies

The IBA Rules of Evidence permit the production and submission into evidence of copies of documents, rather than originals. Of course, the copies must fully conform to the originals (Article 3.12(a), formerly Article 3.11). The arbitral tribunal may request the production of an original document at any time, so that if a party believes that the copy does not fully conform to the original document, it may ask the arbitral tribunal to require the production of that original.

As electronic transmission and storage of documents often leads to the existence of multiple copies of the same document, the revised text of the IBA Rules of Evidence provides that a party is not obligated to produce multiple copies of documents that are "essentially identical" unless the arbitral tribunal decides otherwise (Article 3.12(c)). In some cases, multiple copies may be individually relevant to the dispute. In other cases, the production of multiple copies of the same document may unduly increase the cost of reviewing the documents for the other party and even be at odds with the parties’ obligation to conduct themselves in good faith in the taking of evidence (Preamble 3).

Form of production for electronic documents

The cost of the taking of evidence in electronic form can vary widely depending on the form in which documents are to be submitted. Thus, absent agreement by the parties or determination by the arbitral tribunal to another form, the revised text of the IBA Rules of Evidence provides that the default form of production for electronic documents shall be the form most convenient or economical to the producing party that is reasonably usable by the recipient (Article 3.12(b)). This format will generally not be the native format with full metadata, as submission in this format can be unduly expensive and inconvenient. Where electronic disclosure is likely to play a role in an arbitration, the question of the form of production should be addressed early in the Article 2.1 consultation (see Article 2.2(c)).

Translations

Article 3.12(d) requires that if translations of documents are to be submitted, they are to be submitted together with the originals, marked as translations and identify the original language. The IBA Rules do not govern whether translations are required in particular arbitral proceedings, whether particular documents may be translated in part only, the resolution of disputes regarding translations or the timing of submission of translations.

Confidentiality

Both the Working Party and the Subcommittee discussed at length what confidentiality ought to be accorded to documents produced pursuant to the IBA Rules of Evidence. The issue of the extent of confidentiality that should attach to arbitration proceedings continues to be a controversial topic, in particular with respect to intellectual property and investment treaty-based arbitrations. The Working Party decided in 1999 that the IBA Rules of Evidence should not seek to change the evolving standards with respect to confidentiality and distinguished between
documents submitted by a party in support of its own case and documents produced pursuant to a request to produce or other procedural order of the arbitral tribunal. When reconsidering the issue, the Subcommittee decided to expand Article 3.13 (formerly Article 3.12) to cover the former category as well as documents submitted by non-parties.

Article 3.13 now provides that any document submitted or produced by either parties or non-parties in the arbitration is to be kept confidential by the arbitral tribunal and by the other parties. Such a document may be used only in connection with the arbitration. This requirement does not apply to documents that are already in the public domain or are made public by the parties prior to production in the arbitration. Of course, parties remain free to make their own documents public at any time.

The IBA Rules of Evidence take no position with respect to the confidentiality of non-documentary evidence such as oral testimony (although a transcript recording oral testimony would be subject to confidentiality protection as a document submitted or produced by a non-party). Furthermore, the "General Rules" applicable to the arbitration may also impose requirements relevant to confidentiality, or the parties or the arbitral tribunal may agree or determine additional rules relating to confidentiality (see Article 9.4, which applies to all types of evidence). For this reason, the IBA Rules state simply, "this requirement shall be without prejudice to all other obligations of confidentiality in the arbitration". Therefore, parties must look to the institutional or ad hoc rules pursuant to which they are conducting the arbitration, or to the parties' agreement or the legal regime governing the arbitration, to determine what level of confidentiality would apply to such documents.

Finally, the revised IBA Rules of Evidence also include certain exceptions to this obligation, namely where disclosure is required of a party to fulfil a legal duty, protect or pursue a legal right or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. To prevent inadvertent disclosure of documents, tribunals and parties are well-advised to discuss procedures for consideration of confidentiality in any consultation under Article 2.1 (e.g., proper retention or deletion of evidence following conclusion of arbitral proceedings and any challenge or enforcement proceedings).

**Inferences**

Article 9.5 (formerly Article 9.4) of the IBA Rules of Evidence provides that if a party fails to comply with a procedural order of an arbitral tribunal concerning the production of documents, then the arbitral tribunal may infer from this failure to comply that the content of the document would be adverse to the interests of that party. This inference also applies when an opposing party does not make a proper objection to a request to produce within the time-limit set by the arbitral tribunal, but nevertheless fails to produce requested documents. As an additional deterrent, new Article 9.7 provides that in assigning costs, the arbitral tribunal may also consider the failure of a party to conduct itself in good faith in the taking of evidence. Such failure may include a failure to comply with orders to produce.
Stages

New Article 3.14 provides that the taking of documentary evidence may also be scheduled in phases. This procedure was already contemplated by the previous text of the IBA Rules with reference to witness testimony (Article 4.4), and has now been expanded to encompass documentary evidence as well. This mechanism can be an important means to manage time and control costs in particular circumstances and may be proposed by the parties or introduced by the tribunal of its own accord.

Article 4 — Witnesses of Fact

In arbitration, the facts of the case are often established through witnesses, who testify about events of which they have personal knowledge. This personal knowledge distinguishes the witnesses of fact from experts, who provide opinions based on their expertise in a particular field. Witnesses of fact are addressed in Article 4 of the IBA Rules of Evidence; experts are addressed in Articles 5 and 6.

While witness testimony is less frequently used as evidence in civil law courts, where documentary evidence is preponderant, than in common law courts, arbitration proceedings in both the civil law and common law traditions often rely on witnesses. In the common law tradition, witnesses are questioned by the parties. In the civil law tradition, they are questioned by the court; parties may at most suggest to the court questions to be asked. In transnational arbitrations, the arbitral tribunal and the parties need to establish how to handle witnesses of fact.

Arbitration rules and statutes are usually silent on witness testimony. The IBA Rules of Evidence thus fill in a substantial gap: Article 8 of the IBA Rules of Evidence, discussed later, addresses how witnesses are examined at the hearing; Article 4, to be discussed here, organizes the stages before this hearing.

Information on Witnesses

Article 4.1 requires each party to identify the witnesses on whose testimony it intends to rely, as well as the subject matter of that testimony. As a result of this requirement, which is common practice and explicitly confirmed in various sets of arbitration rules, the opposing party cannot be surprised by unannounced witnesses or facts and can select its own evidence in response well in advance of the hearing.

The revised text of the IBA Rules of Evidence requires that each witness statement contain a statement as to the language in which it was originally prepared and the language in which the witness anticipates giving testimony at the evidentiary hearing (Article 4.5(c)). If no witness statement is prepared for a witness, each party should inform the arbitral tribunal and the other parties in the event the witness intends to testify in a language other than the language of the arbitration proceedings. If the witness cannot present evidence in the language of the arbitration proceedings, translation has to be provided.

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6 See, e.g., HKIAC Rules, Article 23.5; ICDR Arbitration Rules, Article 20.2; LCIA Rules, Article 20.1; SCC Arbitration Rules, Article 28(1); UNCITRAL Arbitration Rules, Article 25.2; WIPO Arbitration Rules, Article 54.
The 1983 IBA Rules imposed a fixed time period for submitting this information on witnesses if parties did not agree or if the tribunal did not impose another time frame. The UNCITRAL and ICDR Arbitration Rules require that the information must be given at least some time before the hearing. The IBA Rules of Evidence leave it entirely to the tribunal to impose the time within which the information must be given.

**Affiliated Persons as Witnesses**

Differences exist among legal systems as to whether an executive employee, agent or other person affiliated with one of the parties in dispute can be heard as a witness. This status as a witness may have important consequences. For instance, in some legal systems, a party may be a witness in its own case, whereas in others only third parties may testify as witnesses. In such systems, a party providing information would not be considered a "witness", and the information would not be provided under oath or a similar commitment to tell the truth.

Article 4.2 of the IBA Rules of Evidence, however, provides that the party’s officers, employees and other representatives may be witnesses for the purpose of the IBA Rules of Evidence. Therefore, under Article 8.4, the arbitral tribunal may ask a party witness to affirm, "in a manner determined by the Arbitral Tribunal to be appropriate", some commitment to tell the truth. The arbitral tribunal may also consider the identity of a witness, and his or her affiliation with any party, as one of many factors that may or may not affect the weight to be given to such evidence (see Article 9.1).

**Preliminary Contacts Between Party and Witness**

Another important difference between legal systems is the extent to which parties may have contacts with the witnesses they offer. In some systems, parties may discuss with their own witnesses the facts on which they will submit testimony. The degree of "witness preparation" may vary from a general overview of the issues at stake to an extensive rehearsal of the witness’ answers to questions expected to be asked. On the other hand, in some systems it may be impermissible for a lawyer to discuss the case with a witness prior to his testimony in court.

In transnational arbitration, it is now generally well established "that a party and its counsel are, as a general rule, permitted to contact a potential witness on its behalf and question him or her about the facts of the dispute".

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7 1983 IBA Rules, Article 5: "Within 60 days of the delivery of the last introductory submission made by the defendant or by the date agreed between the parties or determined by the arbitration . . . ."

8 See, e.g., HKIAC Rules, Article 23.5; ICDR Arbitration Rules, Article 20.2—at least 15 days; UNCITRAL Arbitration Rules, Article 25.2.

9 UNCITRAL Notes on Organising Arbitral Proceedings, para 67.

10 M. Schneider, " Witnesses in International Arbitration", *ASA Bulletin*, 1993, 302, at 306. However, attorneys from certain civil law countries may deem it a violation of their ethical rules to contact witnesses. Consequently, LCIA Article 20.6 allows such contracts "subject to the mandatory provisions of any applicable law . . . ."
Reflecting the generally accepted practice, the IBA Rules of Evidence, in Article 4.3, confirm that it is not "improper" for a party or its lawyers to interview its own witnesses. The revised text of the IBA Rules further clarifies that such an interview need not remain general, but may indeed relate to the subject-matter of the prospective testimony. At the same time, of course, the arbitral tribunal may consider the scope of any such interview in assessing the weight it accords the witness's testimony (see Article 9.1). Of course, the drafting of a witness statement presupposes contact between the witness and the party that is presenting him or her.

**Witness Statements**

Pursuant to the IBA Rules of Evidence, the arbitral tribunal may order the parties to submit to the arbitral tribunal and the other parties a written "witness statement" (see Article 4.4). The arbitral tribunal, in consultation with the parties, should determine whether or not to require such witness statements, depending on the circumstances of each case.

If witness statements are used, the evidence that a witness plans to give orally at the hearing is known in advance. The other party can thereby better prepare its own examination of the witness and select the issues and witnesses it will present. The tribunal is also in a better position to appreciate the testimony and put its own questions to these witnesses. Witness statements may in this way contribute to a shortening of the length of oral hearings. For instance, they may be considered as the "evidence in chief" ("direct evidence"), so that extensive explanation by the witness becomes superfluous and examination by the other party can start almost immediately.

In order to save on hearing time and expense, witnesses need not appear unless their presence is requested by a party or the arbitral tribunal (Article 8.1). Often the arbitral tribunal and the parties may agree that a witness whose statement is either not contested or not considered material by the opposing party need not be present at the oral hearing.  

Article 4.5 of the IBA Rules of Evidence specifies that a witness statement shall contain:

- the name and address of a witness; any present and past relationship with any of the parties; his or her background and qualifications;
- a full and detailed description of the facts and the source of the witness’s information, as well as any documents on which the witness relies that have not already been submitted;
- a statement as to the language in which the witness statement was originally prepared and the language in which the witness anticipates giving testimony at the evidentiary hearing; and

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11 The possibility that uncontested witnesses can limit their testimony to the written statement and do not have to attend the oral evidentiary hearing is provided for in ICDR Arbitration Rules, Article 20.5; LCIA Rules, Article 20.3; SCC Rules, Article 28(3); WIPO Arbitration Rules, Article 54(d).
The IBA Rules of Evidence do not require that the statement be made under oath. Arbitration practice and legal systems differ too much on this point. In many civil law systems, sworn declarations can be made only before the state court authorities, or a notaire, which makes sworn affidavits too cumbersome. Consequently, sworn affidavits cannot be the required form for witness statements in transnational arbitration proceedings.\textsuperscript{12} The IBA Rules of Evidence simply require a witness of fact to affirm that he or she commits to tell the truth (Article 8.4). This wording was revised in 2010 for purposes of greater clarity and precision.

Article 4.4 of the IBA Rules of Evidence leaves it to the arbitral tribunal to specify when the written statements have to be submitted. There is a basic choice to be made in this respect: the parties may exchange their statements simultaneously or consecutively. The second round of witness statements should address only information contained in witness statements, expert reports or submissions submitted by another party in the first round or otherwise not previously presented in the arbitration (see Article 4.6).

**Appearance of Witnesses for Testimony in an Evidentiary Hearing**

Revised Article 8.1 requires each party to inform the arbitral tribunal and the other parties of the witnesses whose appearance at the hearing it requests. This aligns the IBA Rules to current best practice, according to which witnesses appear only if cross-examination has been requested or the party presenting the testimony wishes to do so by means of live testimony rather than written statements alone.

Any witness whose appearance has been so requested by any party, or from whom the arbitral tribunal wishes to hear, shall attend the hearing. If a witness whose appearance has been requested fails to attend without a valid reason, the arbitral tribunal shall disregard the witness statement unless exceptional circumstances justify this failure to attend (Article 4.7).\textsuperscript{13}

If the parties and the arbitral tribunal agree that a fact witness need not appear, the progress of the arbitration may be enhanced. Article 4.8 states that such an agreement does not reflect agreement on the content of the witness statement. Article 5.6 contains a similar rule for expert reports.

The revised text of the IBA Rules of Evidence provides that a witness’s "appearance" shall be in person, unless the arbitral tribunal allows the use of videoconference or similar technology (Article 8.1). An application for permission for a particular witness to appear by videoconference should state the reasons why that particular witness is unable to appear in person and propose a protocol. The tribunal’s decision should depend, among other things, on the sufficiency of the reasons given and the ability of the proposed protocol to maintain equality.

\textsuperscript{12} Under LCIA Rules, Article 20.3, and WIPO Arbitration Rules, Article 54(d), the parties for instance, have the choice between mere signed statements or sworn affidavits, unless the tribunal has ordered otherwise.

\textsuperscript{13} See also LCIA Rules, Article 20.4, and WIPO Arbitration Rules, Article 54(d).
and fairness among the parties and approximate live testimony. The technology used should ensure sufficient quality of transmission and include a fall-back plan should the quality become insufficient. The ability to share exhibits between the witness and the hearing room is desirable. Additionally, the protocol should ensure that the witness testifies under the same conditions as he or she would have in the hearing, i.e. without conferring with anyone else during testimony or referring to any documents to which the other participants do not have access.

Recalcitrant Witnesses

If a witness whose testimony is requested by a party refuses to cooperate, that party may ask the arbitral tribunal to take whatever steps are available to obtain that testimony, or seek leave from the arbitral tribunal to take such steps itself (see the discussion of Article 3.9 above relating to document production from third parties). The arbitral tribunal, however, may exercise its discretion to refuse this request if it considers the potential testimony of the witness not to be relevant to the case or material to its outcome (see Article 4.9).

Under most arbitration laws, either the arbitral tribunal or a party with the approval of the arbitral tribunal may ask the State courts to compel the witness to appear or to examine the witness itself. As a general rule, it shall be the State courts at the seat of arbitration which may help the arbitral tribunal to obtain testimony from a recalcitrant witness. In transnational proceedings, however, witnesses often are not domiciled in the country where the arbitration has its seat. The arbitral tribunal may then have to request help from foreign courts, directly or indirectly. The power of an arbitral tribunal in such circumstances is, of course, limited to "whatever steps are legally available" to it (see Article 4.9). In some cases, however, the tribunal may elect instead to authorise a party to take such steps and approach the foreign courts itself. Proceeding in this manner might be more practical or efficient if, for instance, the party requesting the evidence was located in that country, spoke the local language or already had local legal counsel.

Witnesses Requested by Tribunal

Witnesses of fact are the responsibility of the parties. The parties have to select the witnesses they will present and the issues on which they will testify. However, the revised text of the IBA Rules provides that the arbitral tribunal may request the appearance of a particular witness even if neither party requests that witness’s appearance (Article 8.1). As a general matter, the arbitral tribunal may order any party to provide for, or to use its best efforts to provide for, the appearance for testimony of any person, including one whose testimony has not yet been offered (Article 4.10). However, a party also has the right to object to any such request addressed to it for the reasons set forth in Article 9.2.

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14 See, e.g., UNCITRAL Arbitration Model Law, Article 27.
Article 5 — Party-Appointed Experts

Modern arbitration rules specifically refer to party-appointed experts. In particular, most of these rules codify the well-established notion that a party can present its own expert witnesses to testify on the points at issue.

Early Disclosure of Expert Evidence

In accordance with the last paragraph of the Preamble and Article 5.1, a party intending to rely on expert testimony must so notify the other party. As with other provisions of the IBA Rules of Evidence, the arbitral tribunal shall determine when such notification and the submission of expert reports shall occur (see Article 5.1). In scheduling the reports, the arbitral tribunal should consider the interaction of this provision with other submissions made by the parties, such as the supplemental witness statements provided for in Article 4.6.

Content of the Expert Report

Article 5.2 sets forth the requirements for expert reports. Most importantly, the expert report must describe "the methods, evidence and information used in arriving at the conclusions" (see Article 5.2(e)). This information is required in order to place the other party in a position meaningfully to evaluate the expert report. If the expert has relied on any documents not already submitted in the arbitration, these must be provided as well (Article 5.2(e)).

Article 5.2(g) commits the expert to his or her report. The wording of this subsection differs slightly from the wording found in Article 4.5(d) addressing fact witnesses, as the contents of the expert report will contain opinions and expert views. Nevertheless, the expert should be prepared to take responsibility for the contents of his or her report.

Article 5.2(a) requires disclosure with respect to any and all relationships the expert may have with the parties, their legal advisors and the arbitral tribunal. Article 5.2(c) then requires a statement of the expert’s "independence". While the former requirement requires disclosure, satisfaction of the latter requirement requires the expert to evaluate any such relationships and attest that he or she is "independent", for example in the sense that he or she has no financial interest in the outcome or otherwise has relationships that would prevent the expert from providing his or her honest and frank opinion. Receiving payment for services as an expert does not preclude "independence". Article 5.2(c) is intended to emphasise the duty of each party-appointed expert to evaluate the case in an independent and neutral fashion rather than to exclude experts with some connection to the participants or the subject-matter of the case.

Article 5.2(i) requires that where multiple persons sign an expert report, as is sometimes the case when an organisation is hired as an expert, the report must indicate whether the report is attributable as a whole to a single author or, if not, which specific parts thereof may be attributed to each co-author. This requirement is intended to aid parties in determining which experts they

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15 See, e.g., HKIAC Rules, Article 23.5; 1998 ICC Rules, Article 20(3); 1997 ICDR Rules, Article 22(4); 1998 LCIA Rules, Article 21(2); SCC Rules, Article 28; 1994 WIPO Rules, Article 55(c); UNCITRAL Rules, Article 27(4).
wish to attend the evidentiary hearing (Article 8.1) as well as in preparing for questioning one or more of the co-authors.

Pursuant to Article 8.3, parties may submit a second round of rebuttal expert reports. However, these rebuttal reports are limited to responses to matters contained in another party’s witness statements, expert reports or other submissions that have not been previously presented in the arbitration. Considerations of efficiency and good faith weigh in favour of giving a party a single opportunity to present its arguments and allowing additional opportunities only when it was not possible to make those arguments at the time. This procedure helps to prevent parties from attempting to surprise other parties with evidence or to derail the procedural timetable late in the proceedings.

**Pre-hearing Conference among Experts**

Article 5.4 permits the arbitral tribunal to order the party-appointed experts to meet and to discuss the issues considered or to be considered in their expert reports either in advance of their preparation or in advance of the hearing. Article 8.3(f) provides for conferencing of experts or fact witnesses during an evidentiary hearing. If they can reach agreement on any issues, they shall record that agreement in writing as well as any remaining areas of disagreement and the reasons therefor.

The practices suggested here, when deemed appropriate by the arbitral tribunal, can make the proceeding more economical. Experts from the same discipline, who are likely to know each other, can identify relatively quickly the reasons for their diverging conclusions and work towards finding areas of agreement. The revised Rules provide additionally for consultation before the reports are drafted, which may be an effective means to produce reports that identify the areas where the experts agree and are narrowly focused on the remaining areas of disagreement. Where the experts succeed in reaching agreement on their findings, the parties and the arbitral tribunal will likely accept those findings, so that the hearing may focus on the truly disputed aspects of the case.

**Appearance of Experts at Evidentiary Hearings**

Article 8.1 of the revised IBA Rules foresees the same mechanism for determining whether experts or fact witnesses must appear for testimony at an evidentiary hearing, namely on the request of any party or the arbitral tribunal. As with fact witnesses, the expert report of a non-appearing party-appointed expert may nevertheless be accepted "in exceptional circumstances" if the arbitral tribunal so determines (see Article 5.5), and agreement not to require attendance of an expert witness at hearing does not reflect agreement on the content of the expert report (see Article 5.6).

Finally, it is worth noting that the IBA Rules of Evidence do not address how to deal with the testimony of an expert called upon to testify when such expert had previously been appointed by a national court in connection with the same issues. European parties frequently apply to their local courts, immediately upon the occurrence of an injury and long before arbitration is commenced, for the appointment of an expert to determine the cause of the damage and possible remedies or to preserve evidence. It is often difficult for an Anglo-American lawyer to be
Article 6 —Tribunal-Appointed Experts

Article 6 regulates the appointment of independent experts by the arbitral tribunal. A general principle underlying Article 6 is the substantial involvement of the parties in the process, even though the expert is being appointed by the arbitral tribunal itself. Article 6.1 makes clear that the arbitral tribunal is to consult with the parties before appointing such an expert and also with respect to the terms of reference for such an expert. The parties also have an opportunity, pursuant to Article 6.2, to identify any potential conflicts of interest and to state any objections (e.g., lack of independence, insufficient qualification, lack of availability, cost) on such basis. Most importantly, parties have an opportunity to be involved in the information-gathering process by the tribunal-appointed expert and to respond to any report by that expert. However, to avoid delays, Article 6.2 now provides that later objections may be made only if they relate to reasons of which the party becomes aware after the appointment has been made.

Article 6.3 provides the parties and their representatives with the right to receive any information obtained by the tribunal-appointed expert and to attend any inspection conducted by the expert.

Article 6.4 sets forth the required contents of the expert report. These requirements are the same as those in Article 5.2 with the exception of the statement of independence required of party-appointed experts (which the tribunal-appointed expert had already submitted before accepting the appointment (Article 6.2)).

Article 6.5 permits the parties to examine any documents that the tribunal-appointed expert has examined and any correspondence between the arbitral tribunal and the tribunal-appointed expert. That Article also provides any party with the opportunity to respond to a report by a tribunal-appointed expert, within the time ordered by the arbitral tribunal. The Working Party and the Subcommittee believed strongly that parties should know what the arbitral tribunal is being told by a tribunal-appointed expert and should have an opportunity to rebut his or her conclusions. A party may respond either by making its own submission or by submitting a witness statement or an expert report by its party-appointed expert.

The tribunal-appointed expert shall be present at an evidentiary hearing and available for questioning at that hearing, so long as any party or the arbitral tribunal requests such presence. Article 6.6 permits the parties or their party-appointed experts to question the tribunal-appointed expert at the hearing. However, the scope of this questioning is limited to the issues covered in his or her expert report and the responses provided pursuant to Article 6.5: namely, a party’s submission, witness statement or an expert report by a party-appointed expert that is provided in response to the tribunal-appointed expert's report. This provision is included to assure that the tribunal-appointed expert knows in advance the subjects on which he or she might be questioned, in order to prepare his or her responses. The Working Party wanted to avoid situations where
issues were raised involving the tribunal-appointed expert’s report for the first time at the hearing, which would inevitably require an adjournment for the party-appointed expert to consider that issue before the hearing could resume.

Article 6.3 makes certain that the tribunal-appointed expert shall have access to whatever information he or she needs to respond to the issues posed in his or her terms of reference. The tribunal-appointed expert may request the party to provide any relevant and material information, which includes relevant documents, goods, samples, property, machinery, systems, processes or access to a site for inspection. Parties have the right to object to such requests, based upon the provisions of Article 9.2. If such an objection is raised, the arbitral tribunal shall make a determination as to the materiality and the appropriateness of the tribunal-appointed expert’s request in the manner provided in Articles 3.5–3.8, which concern requests to produce.

Finally, in Article 6.7, the IBA Rules of Evidence make clear that it is the arbitral tribunal, not the tribunal-appointed expert, who is to determine the issues in the case. That Article provides that a tribunal-appointed expert’s report "and its conclusions shall be assessed by the Arbitral Tribunal with due regard to all circumstances of the case".

Article 7 — Inspection

Article 7 is a simple provision, making possible inspections of relevant site, property, machinery or any other goods, samples, systems, processes or documents that may help the decision-making process, wherever they may be located. Such inspections most frequently occur in construction arbitrations, in which the arbitral tribunal visits the construction site in dispute.

Article 8 — Evidentiary hearing

Article 8 deals with the evidentiary hearing, a term defined in the Definitions section. The evidentiary hearing may be held in person, by teleconference or other method, and it involves the presentation of oral or other evidence to the arbitral tribunal. In most international arbitrations, this hearing is preceded by substantial preparation, on the principle that each party shall be entitled to know reasonably in advance the evidence on which the other parties rely (see Preamble, paragraph 3). There may have been a Terms of Reference or other type of preliminary or preparatory hearing.16 There will have been an exchange of extensive written submissions containing allegations of fact and often discussions of law. Documents will have been submitted (see above, Article 3). Witnesses of fact may have submitted written witness statements (see above, Article 4). Party-appointed experts or tribunal-appointed experts may have submitted written expert reports (see above, Articles 5 and 6). The parties must have adequate notice of the evidentiary hearing.17

16 See, ICC Rules, Article 18; ICSID Arbitration Rules, Rule 21; UNCITRAL Notes on Organising Arbitral Proceedings, paragraph 17; WIPO Arbitration Rules, Article 47.

17 See, e.g., HKIAC Rules, Article 23.3; ICC Rules, Article 21(1); ICDR Arbitration Rules, Article 20.1 (30 days); LCIA Arbitration Rules, Article 19.2; SCC Arbitration Rules, Article 27.2; UNCITRAL Arbitration Rules, Article 25(1); WIPO Arbitration Rules, Article 53(b). The 15 days in Article 25 of the UNCITRAL Arbitration Rules are usually too short.
As a result of all this preparation, by the time the evidentiary hearing is conducted the various participants in the arbitral process are likely to know each other better, and they will also know the case better than at the outset of the arbitration.

Article 8 of the IBA Rules of Evidence is the most general of all the provisions. The Article provides a general framework for the procedure to be followed at the evidentiary hearing. This is necessary because the variety of procedures and order to be followed at an evidentiary hearing is enormous. Ordinarily, parties and the arbitral tribunal will be able to devise the procedures best suited to the circumstances of the case. While some of the special features described in Article 8 will be seen in many evidentiary hearings, an evidentiary hearing incorporating them all should be rare.

Managing the Hearing

Article 8.2 makes clear that the power to manage the evidentiary hearing rests with the arbitral tribunal, not the parties, an idea which originally came from civil law procedure but which has been widely adopted. The arbitral tribunal may limit or exclude questioning, or even the appearance of a witness, if it is irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. While some counsel are accustomed to raising objections, the arbitral tribunal may also apply these standards on their own. This Article also finds objectionable unreasonably leading questions, which may render direct and re-direct testimony worthless. These provisions are all designed to give the arbitral tribunal the ability to focus the hearing on issues material to the outcome of the case and thereby make hearings more efficient.

Order of Witnesses

Articles 8.3 (a), (b) and (c) set out the basic order of witnesses followed in many cases: claimant’s witnesses, followed by respondent’s witnesses, and experts. For each witness, testimony is first presented by the party offering that witness, followed by examination by the opposing party and then an opportunity for re-examination by the presenting party. Usually, any re-examination is limited to new matters raised in the previous oral testimony. Many arbitral tribunals ask their questions only towards the end, except for questions designed to help the process along or to make a witness feel comfortable.

However, arbitral tribunals, particularly in more complex cases, are increasingly adapting these procedures to provide for better examination of the issues in dispute. Article 8.3(g) confirms the arbitral tribunal's ability to pose questions at any time. Arbitral tribunals often hear oral argument by counsel for the parties, which may be a part of, or may be separate from, the evidentiary hearing. Therefore, Article 8.3(f) confirms the discretion of arbitral tribunals to vary this order of proceeding in the manner best suited for the circumstances of that case. For example, the provision allows the arrangement of testimony by particular issues or that witnesses be questioned at the same time and in confrontation with each other about particular issues (witness conferencing). Such techniques may enable arbitral tribunals better to understand the

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18 See, e.g., ICC Rules, Article 21(3); ICDR Arbitration Rules, Article 16.1; LCIA Arbitration Rules, Article 14.2 (to the extent no party agreement to the contrary); SCC Rules, Article 19; UNCITRAL Arbitration Rules, Article 15.1.
contradictions in testimony and to be able to determine the weight and credibility to be given to the testimony. Ultimately, the IBA Rules of Evidence leave it to the arbitral tribunal and the parties to determine how best to proceed.

The IBA Rules of Evidence do not address whether witnesses who have not yet testified may be in the hearing room or whether witnesses who have testified may remain. This is left for the arbitral tribunal to decide, because it depends on the circumstances of the case, the nature of the dispute and the persons involved.

The affirmation by a witness that he or she commits to telling the truth, as described in Article 8.4, is widely observed. Often, the arbitral tribunal will also simply admonish the witness to tell the truth, and sometimes it will additionally advise the witness of criminal sanctions applying at the seat of the arbitration or at the physical place of the hearing. Arbitral tribunals, at least in some countries, rarely swear in the witness themselves.

Where witnesses and experts have provided written witness statements or expert reports, they are first confirmed at the beginning of the testimony. The third sentence of Article 8.4 states the rule applied in many arbitrations where witness statements are used, that such statements may serve in lieu of the witness’s direct testimony. Having the witness statement stand entirely in lieu of direct testimony provides an incentive for witness statements to be comprehensive.

Nothing in the IBA Rules of Evidence, however, prevents an arbitral tribunal from hearing witnesses in another manner, such as the traditional method in certain civil law countries where witnesses are initially questioned by the arbitral tribunal, followed by questioning by the parties. This is a technique which presupposes a thorough knowledge of the case and a full study of the law by the arbitral tribunal.

Tribunal Witnesses

Inquisitorial powers of the arbitral tribunal follow from the lex arbitri of the seat of the arbitration. Inquisitorial powers may also follow from the arbitration rules agreed by the parties. The IBA Rules of Evidence do not provide for similarly sweeping inquisitorial powers of the arbitral tribunal, but Article 8.5 covers the main case where inquisitorial powers may be exercised: the hearing of a key witness who typically had an earlier association with both parties but whom the parties for some reason failed to persuade to appear, perhaps because they no longer have close ties with the witness. Such a tribunal witness will often be questioned in the inquisitorial fashion described above. To proceed in this fashion is not mandated, but is contemplated by the second sentence of Article 8.5.

At the close of an evidentiary hearing, the parties are sometimes invited to comment on the assessment of the evidence and on the law. Such comments may also be made in post-hearing briefs or at a separate "final" or "pleading" hearing, or in both. The IBA Rules of Evidence do not address this phase of the proceeding.

19 See, e.g., Article 34, subs. 2 lit. g, English Arbitration Act 1996; Article 184 Swiss Private international Law Act.

20 See, e.g., ICC Rules, Article 20; LCIA Rules, Article 22.1(c).
Article 9 — Admissibility and Assessment of the Evidence

Articles 1–8 of the IBA Rules of Evidence provide the mechanisms for the gathering and presentation of evidence to the arbitral tribunal. Article 9 provides the principles by which the arbitral tribunal should determine what evidence it should properly consider and how it should assess the evidence that is properly before it.

Article 9.1 states the general principle, also found in many institutional and ad hoc arbitration rules, that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of evidence. Obviously, the arbitral tribunal shall exercise its discretion in making such determinations, which are central to its role.

Article 9.2 provides the limitations on admissible evidence, whether oral or written. These limitations also apply to the production of documents pursuant to Article 3 and inspections pursuant to Article 7. These limitations are important, for they preserve the lines of distinction between the rights of the parties and the authority of the arbitral tribunal. While the provision states that the arbitral tribunal "shall" exclude evidence meeting one of the specified exceptions, the arbitral tribunal obviously retains its discretion to determine whether one of the specified criteria has been met.

Article 9.2(a) states the simple proposition that the arbitral tribunal shall exclude evidence that is not sufficiently relevant to the case or material to its outcome.

Article 9.2(b) provides protection for documents and other evidence that may be covered by certain privileges, under the appropriate applicable law, such as the attorney-client privilege, professional secrecy or the without prejudice privilege. The Working Party felt that it was important that such privileges be recognised in international arbitration.

The Subcommittee provided additional non-binding guidance on determining the applicable privileges in Article 9.3. Although the standard to be applied is left to the discretion of the arbitral tribunal, it is desirable that the tribunal take account of the elements set forth in Article 9.3, in particular if the parties are subject to different legal or ethical rules. Article 9.3(a) seeks to encompass both the common law understanding of attorney-client privilege and the civil law understanding of the duty of professional secrecy. Article 9.3(b) expresses a generalised understanding of the so-called "without prejudice" or "settlement" privilege, which is recognised in certain jurisdictions and relates to the contents of settlement negotiations. Article 9.3(c) expresses the guiding principle that expectations of the parties and their advisors at the time the legal impediment or privilege is said to have arisen should be taken into consideration. Often, these expectations will be formed by the approach to privilege prevailing in the home jurisdiction of such persons. Article 9.3(d) encapsulates an important exception to privilege in many countries, namely waiver. Finally, Article 9.3(e) emphasises the need to maintain fairness and equality among the parties. The need to protect fairness and equality among the parties may arise when the approach to privilege prevailing in the parties' home jurisdictions differs. For example, one jurisdiction may recognize the settlement privilege, whereas another may not, or one jurisdiction may extend the attorney-client privilege to in-house counsel, whereas another may not. In such cases, applying different rules to the parties could create unfairness by shielding the documents of one party from production but not those of the other.
Article 9.2(c) permits the arbitral tribunal to exclude from production or from evidence any documents or evidence which would be an unreasonable burden to produce. This unreasonable burden can take many forms, and the nature of the burden is purposely left to the discretion of the arbitral tribunal. For example, it may involve the production of documents pursuant to a request to produce which, although properly identified pursuant to Article 3.3(a)(i) and relevant to the case and material to its outcome, would because of their sheer quantity create an unreasonable burden on the receiving party to produce. Similarly, Article 9.2(c) could cover a situation where a certain document exists and may even be considered to be within the "possession, custody or control" of another party (see Article 3.3(c)(ii)), but which nevertheless could be unreasonably difficult for the party to obtain. Article 9.2(d) is also straightforward, as a document that has been lost or destroyed cannot reasonably be produced. As it may be impossible to prove a negative (loss of the document), Article 9.2(d) provides that such loss shall be shown with a reasonable likelihood to have occurred.

Articles 9.2(e) and (f) involve special and related concerns. Article 3 reflects the belief that some internal documents are properly subject to production in international arbitration, even documents that may not be producible in a state court in certain jurisdictions. However, the IBA Rules also recognise that some documents may be subject to such commercial or technical confidentiality concerns that they should not be required to be produced or introduced into evidence. When an early draft of the IBA Rules of Evidence referred only to such confidentiality, certain international political organisations pointed out that "commercial and technical confidentiality" might not include confidentiality within such organisations. Therefore, Article 9.2(f) was added to put such special political or institutional sensitivity on an equal footing with commercial or technical confidentiality. In the case of both provisions, the arbitral tribunal retains the discretion to determine whether the considerations of confidentiality or sensitivity are sufficient to warrant the exclusion from evidence or production of those documents or other evidence. As noted in the IBA Rules, the arbitral tribunal must find the concerns to be "compelling" in order to exclude the evidence. Article 9.4 also makes clear that the arbitral tribunal may make certain arrangements, such as entering a confidentiality agreement or order, to permit evidence to be considered subject to suitable confidentiality protection.

Article 9.2(g) is a catch-all provision, intended to assure procedural economy, proportionality, fairness and equality in the case. For example, documents that might be considered to be privileged within one national legal system may not be considered to be privileged within another. If this situation were to create an unfairness, the arbitral tribunal may exclude production of the technically non-privileged documents pursuant to this provision. In general, it is hoped that this provision will help ensure that the arbitral tribunal provides the parties with a fair, as well as an effective and efficient, hearing.

Finally, as noted above in the discussion of Article 3, Articles 9.5 and 9.6 create inferences where a party has failed to produce a document or make available other evidence required by the arbitral tribunal. The arbitral tribunal may then conclude that such document or evidence would be adverse to the interests of that party. New Article 9.7 specifically grants the arbitral tribunal the discretion to sanction parties for breaches of good faith (see Preamble paragraph 3) by way of the apportionment of costs or any other means available under the IBA Rules.
The IBA Arbitration Committee and its Rules of Evidence Subcommittee believe that the revised IBA Rules preserve the careful balance achieved by the 1999 IBA Rules of Evidence. They are also confident that the revisions will further promote the use and success of the IBA Rules as an effective mechanism to assist parties in the conduct of international arbitrations.
IBA Rules on the Taking of Evidence in International Arbitration

Adopted by a resolution of the IBA Council
29 May 2010
International Bar Association
IBA Rules on the Taking of Evidence in International Arbitration

Adopted by a resolution of the IBA Council
29 May 2010
International Bar Association
Contents

Members of the Working Party
i

Members of the IBA Rules of Evidence Review Subcommittee
iii

About the Arbitration Committee
1

Foreword
2

THE RULES
4
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About the Arbitration Committee

Established as the Committee in the International Bar Association’s Legal Practice Division which focuses on the laws, practice and procedures relating to the arbitration of transnational disputes, the Arbitration Committee currently has over 2,300 members from over 90 countries, and membership is increasing steadily.

Through its publications and conferences, the Committee seeks to share information about international arbitration, promote its use and improve its effectiveness. The Committee maintains standing subcommittees and, as appropriate, establishes Task Forces to address specific issues. At the time of issuance of these revised Rules, the Committee has four subcommittees, namely the Rules of Evidence Subcommittee, the Investment Treaty Arbitration Subcommittee, the Conflicts of Interest Subcommittee, and the Recognition and Enforcement of Arbitral Awards Subcommittee; and two task forces: the Task Force on Attorney Ethics in Arbitration and the Task Force on Arbitration Agreements.
Foreword

These IBA Rules on the Taking of Evidence in International Arbitration (‘IBA Rules of Evidence’) are a revised version of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, prepared by a Working Party of the Arbitration Committee whose members are listed on pages i and ii.

The IBA issued these Rules as a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration. The Rules provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings. The Rules are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations. The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures.

Since their issuance in 1999, the IBA Rules on the Taking of Evidence in International Commercial Arbitration have gained wide acceptance within the international arbitral community. In 2008, a review process was initiated at the instance of Sally Harpole and Pierre Bienvenu, the then Co-Chairs of the Arbitration Committee. The revised version of the IBA Rules of Evidence was developed by the members of the IBA Rules of Evidence Review Subcommittee, assisted by members of the 1999 Working Party. These revised Rules replace the IBA Rules on the Taking of Evidence in International Commercial Arbitration, which themselves replaced the IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, issued in 1983.

If parties wish to adopt the IBA Rules of Evidence in their arbitration clause, it is recommended that they add the following language to the clause, selecting one of the alternatives therein provided:
‘[In addition to the institutional, ad hoc or other rules chosen by the parties,] [t]he parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence as current on the date of [this agreement/the commencement of the arbitration].’

In addition, parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, at the commencement of the arbitration, or at any time thereafter. They may also vary them or use them as guidelines in developing their own procedures.

The IBA Rules of Evidence were adopted by resolution of the IBA Council on 29 May 2010. The IBA Rules of Evidence are available in English, and translations in other languages are planned. Copies of the IBA Rules of Evidence may be ordered from the IBA, and the Rules are available to download at http://tinyurl.com/iba-Arbitration-Guidelines.

Guido S Tawil
Judith Gill, QC
Co-Chairs, Arbitration Committee
29 May 2010
The Rules

Preamble

1. These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration.

2. Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration.

3. The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.

Definitions

In the IBA Rules of Evidence:

‘Arbitral Tribunal’ means a sole arbitrator or a panel of arbitrators;

‘Claimant’ means the Party or Parties who commenced the arbitration and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties;

‘Document’ means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means;

‘Evidentiary Hearing’ means any hearing, whether or not held on consecutive days, at which the Arbitral Tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence;
'Expert Report' means a written statement by a Tribunal-Appointed Expert or a Party-Appointed Expert;

'General Rules' mean the institutional, ad hoc or other rules that apply to the conduct of the arbitration;

'IBA Rules of Evidence' or 'Rules' means these IBA Rules on the Taking of Evidence in International Arbitration, as they may be revised or amended from time to time;

'Party' means a party to the arbitration;

'Party-Appointed Expert' means a person or organisation appointed by a Party in order to report on specific issues determined by the Party;

'Request to Produce' means a written request by a Party that another Party produce Documents;

'Respondent' means the Party or Parties against whom the Claimant made its claim, and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties, and includes a Respondent making a counter-claim;

'Tribunal-Appointed Expert' means a person or organisation appointed by the Arbitral Tribunal in order to report to it on specific issues determined by the Arbitral Tribunal;

'Witness Statement' means a written statement of testimony by a witness of fact.

Article 1 Scope of Application
1. Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal.

2. Where the Parties have agreed to apply the IBA Rules of Evidence, they shall be deemed to have agreed, in the absence of a contrary indication, to the version as current on the date of such agreement.

3. In case of conflict between any provisions of the IBA Rules of Evidence and the General Rules, the Arbitral Tribunal shall apply the IBA Rules of
Evidence in the manner that it determines best in order to accomplish the purposes of both the General Rules and the IBA Rules of Evidence, unless the Parties agree to the contrary.

4. In the event of any dispute regarding the meaning of the IBA Rules of Evidence, the Arbitral Tribunal shall interpret them according to their purpose and in the manner most appropriate for the particular arbitration.

5. Insofar as the IBA Rules of Evidence and the General Rules are silent on any matter concerning the taking of evidence and the Parties have not agreed otherwise, the Arbitral Tribunal shall conduct the taking of evidence as it deems appropriate, in accordance with the general principles of the IBA Rules of Evidence.

Article 2 Consultation on Evidentiary Issues

1. The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.

2. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including:
   (a) the preparation and submission of Witness Statements and Expert Reports;
   (b) the taking of oral testimony at any Evidentiary Hearing;
   (c) the requirements, procedure and format applicable to the production of Documents;
   (d) the level of confidentiality protection to be afforded to evidence in the arbitration; and
   (e) the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence.

3. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:
   (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or
   (b) for which a preliminary determination may be appropriate.
Article 3 Documents

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.

2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.

3. A Request to Produce shall contain:
   (a) (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
   (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
   (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.

5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the
Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3.

6. Upon receipt of any such objection, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.

7. Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article 9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

8. In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.

9. If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such
steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that (i) the Documents would be relevant to the case and material to its outcome, (ii) the requirements of Article 3.3, as applicable, have been satisfied and (iii) none of the reasons for objection set forth in Article 9.2 applies.

10. At any time before the arbitration is concluded, the Arbitral Tribunal may (i) request any Party to produce Documents, (ii) request any Party to use its best efforts to take or (iii) itself take, any step that it considers appropriate to obtain Documents from any person or organisation. A Party to whom such a request for Documents is addressed may object to the request for any of the reasons set forth in Article 9.2. In such cases, Article 3.4 to Article 3.8 shall apply correspondingly.

11. Within the time ordered by the Arbitral Tribunal, the Parties may submit to the Arbitral Tribunal and to the other Parties any additional Documents on which they intend to rely or which they believe have become relevant to the case and material to its outcome as a consequence of the issues raised in Documents, Witness Statements or Expert Reports submitted or produced, or in other submissions of the Parties.

12. With respect to the form of submission or production of Documents:

(a) copies of Documents shall conform to the originals and, at the request of the Arbitral Tribunal, any original shall be presented for inspection;

(b) Documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise;
(c) a Party is not obligated to produce multiple copies of Documents which are essentially identical unless the Arbitral Tribunal decides otherwise; and

(d) translations of Documents shall be submitted together with the originals and marked as translations with the original language identified.

13. Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.

14. If the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal may, after consultation with the Parties, schedule the submission of Documents and Requests to Produce separately for each issue or phase.

Article 4 Witnesses of Fact
1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.

2. Any person may present evidence as a witness, including a Party or a Party’s officer, employee or other representative.

3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.

4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely, except for
those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10. If Evidentiary Hearings are organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each issue or phase.

5. Each Witness Statement shall contain:
   (a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;
   (b) a full and detailed description of the facts, and the source of the witness’s information as to those facts, sufficient to serve as that witness’s evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;
   (c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;
   (d) an affirmation of the truth of the Witness Statement; and
   (e) the signature of the witness and its date and place.

6. If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party’s Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.

7. If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by
that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

8. If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.

9. If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness’s testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome.

10. At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered. A Party to whom such a request is addressed may object for any of the reasons set forth in Article 9.2.

**Article 5 Party-Appointed Experts**

1. A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report.

2. The Expert Report shall contain:

   (a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with
any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;

(b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;

(c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;

(d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;

(e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;

(f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

(g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;

(h) the signature of the Party-Appointed Expert and its date and place; and

(i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

3. If Expert Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Expert Reports, including reports or statements from persons not previously identified as Party-Appointed Experts, so long as any such revisions or additions respond only to matters contained in another Party’s Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.

4. The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or
related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.

5. If a Party-Appointed Expert whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Expert Report by that Party-Appointed Expert related to that Evidentiary Hearing unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

6. If the appearance of a Party-Appointed Expert has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Expert Report.

Article 6 Tribunal-Appointed Experts

1. The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert Report after consulting with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.

2. The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections as to the Tribunal-Appointed Expert’s qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection. After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert’s qualifications or independence only if the objection is for reasons of which the Party becomes aware
after the appointment has been made. The Arbitral Tribunal shall decide promptly what, if any, action to take.

3. Subject to the provisions of Article 9.2, the Tribunal-Appointed Expert may request a Party to provide any information or to provide access to any Documents, goods, samples, property, machinery, systems, processes or site for inspection, to the extent relevant to the case and material to its outcome. The authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal. The Parties and their representatives shall have the right to receive any such information and to attend any such inspection. Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.8. The Tribunal-Appointed Expert shall record in the Expert Report any non-compliance by a Party with an appropriate request or decision by the Arbitral Tribunal and shall describe its effects on the determination of the specific issue.

   (a) the full name and address of the Tribunal-Appointed Expert, and a description of his or her background, qualifications, training and experience;
   (b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
   (c) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Tribunal-Appointed Expert relies that have not already been submitted shall be provided;
   (d) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Tribunal-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;
(e) an affirmation of his or her genuine belief in
the opinions expressed in the Expert Report;
(f) the signature of the Tribunal-Appointed Expert
and its date and place; and
(g) if the Expert Report has been signed by more
than one person, an attribution of the entirety
or specific parts of the Expert Report to each
author.

5. The Arbitral Tribunal shall send a copy of such Expert
Report to the Parties. The Parties may examine any
information, Documents, goods, samples, property,
machinery, systems, processes or site for inspection
that the Tribunal-Appointed Expert has examined
and any correspondence between the Arbitral
Tribunal and the Tribunal-Appointed Expert.
Within the time ordered by the Arbitral Tribunal,
any Party shall have the opportunity to respond to
the Expert Report in a submission by the Party or
through a Witness Statement or an Expert Report
by a Party-Appointed Expert. The Arbitral Tribunal
shall send the submission, Witness Statement or
Expert Report to the Tribunal-Appointed Expert
and to the other Parties.

6. At the request of a Party or of the Arbitral Tribunal,
the Tribunal-Appointed Expert shall be present at
an Evidentiary Hearing. The Arbitral Tribunal may
question the Tribunal-Appointed Expert, and he
or she may be questioned by the Parties or by any
Party-Appointed Expert on issues raised in his or her
Expert Report, the Parties’ submissions or Witness
Statement or the Expert Reports made by the Party-
Appointed Experts pursuant to Article 6.5.

7. Any Expert Report made by a Tribunal-Appointed
Expert and its conclusions shall be assessed by the
Arbitral Tribunal with due regard to all circumstances
of the case.

8. The fees and expenses of a Tribunal-Appointed
Expert, to be funded in a manner determined by the
Arbitral Tribunal, shall form part of the costs of the arbitration.

Article 7 Inspection
Subject to the provisions of Article 9.2, the Arbitral
Tribunal may, at the request of a Party or on its own
motion, inspect or require the inspection by a Tribunal-
Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate.
The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection.

Article 8 Evidentiary Hearing

1. Within the time ordered by the Arbitral Tribunal, each Party shall inform the Arbitral Tribunal and the other Parties of the witnesses whose appearance it requests. Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.2, appear for testimony at the Evidentiary Hearing if such person’s appearance has been requested by any Party or by the Arbitral Tribunal. Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.

2. The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. Questions to a witness during direct and re-direct testimony may not be unreasonably leading.

3. With respect to oral testimony at an Evidentiary Hearing:
   (a) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses;
   (b) following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties’ questioning;
   (c) thereafter, the Claimant shall ordinarily first
present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties’ questioning;

(d) the Arbitral Tribunal may question a Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties’ submissions or in the Expert Reports made by the Party-Appointed Experts;

(e) if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase;

(f) the Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing);

(g) the Arbitral Tribunal may ask questions to a witness at any time.

4. A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she commits to tell the truth or, in the case of an expert witness, his or her genuine belief in the opinions to be expressed at the Evidentiary Hearing. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness’s direct testimony.

5. Subject to the provisions of Article 9.2, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome. Any witness called and
questioned by the Arbitral Tribunal may also be questioned by the Parties.

**Article 9 Admissibility and Assessment of Evidence**

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:
   (a) lack of sufficient relevance to the case or materiality to its outcome;
   (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
   (c) unreasonable burden to produce the requested evidence;
   (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
   (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
   (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
   (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
   (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
   (b) any need to protect the confidentiality of a Document created or statement or oral
communication made in connection with and for the purpose of settlement negotiations;
(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;
(d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and
(e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

4. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.

5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

6. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.

7. If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.
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